THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1995 CUMULATIVE SUPPLEMENT

Volume 2

Chapters 1A through 7A

Prepared under the Supervision of

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

Under the Direction of

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Annotated through 457 S.E.2d 524. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

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Preface

This Cumulative Supplement to Volume 2 contains the general laws of a permanent nature enacted by the General Assembly through the 1995 Regular Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purpose of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to the Michie Company, Law Publishers, Charlottesville, Virginia.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See the main volume for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1995 Regular Session affecting Chapters 1A through 7A of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 340, p. 364.
North Carolina Court of Appeals Reports through Volume 118, p. 737.
South Eastern Reporter 2nd Series through Volume 457, p. 524.
Federal Reporter 3rd Series through Volume 53, p. 349.
Federal Supplement through Volume 882, p. 1100.
Federal Rules Decisions through Volume 160, p. 664.
Bankruptcy Reports through Volume 181, p. 677.
Supreme Court Reporter through Volume 115, p. 2020.
North Carolina Law Review through Volume 73, p. 1760.
Wake Forest Law Review through Volume 30, p. 426.
Campbell Law Review through Volume 17, p. 163.
Duke Law Journal through Volume 44, p. 1049.
North Carolina Central Law Journal through Volume 21, p. 178.
Opinions of the Attorney General.

The General Statutes of North Carolina 1995 Cumulative Supplement

VOLUME 2

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§ 1A-1. Rules of Civil Procedure.

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Rule 1. Scope of rules.

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Cited in In re Greene, 328 N.C. 639, 403 S.E.2d 257 (1991); Garrity v. Morrisville Zoning Bd. of Adjustment, 115 N.C. App. 273, 444 S.E.2d 653, cert. denied, 337 N.C. 692, 448 S.E.2d 523 (1994).

Rule 2. One form of action.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in Pugh v. Pugh, 111 N.C. App. 118, 431 S.E.2d 873 (1993).

Cited in Morrow v. Morrow, 103 N.C. App. 787, 407 S.E.2d 286 (1991).

Article 2.

Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

Rule 3. Commencement of action.

CASE NOTES

I. In General.

I. IN GENERAL.

Extension of Time. — Plaintiff commenced the action before the statute of limitations expired, by filing an application and order extending time to file a complaint. Wooten v. Warren ex rel. Gilmer, 117 N.C. App. 350, 451 S.E.2d 342 (1994).

Expiration of Time Extension. — When plaintiffs failed to file their complaint before the extension of time expired, their action abated, and the three-year statute of limitations had run. The trial court could not extend their time in which to file their complaint under N.C.R.Civ.P., Rule 6(b) thus reviving the original action and avoiding the statute of limitations. Osborne v. Walton, 110 N.C. App. 850, 431 S.E.2d 496 (1993).

A voluntary dismissal of negligence action without prejudice did not toll the statute of limitations in a case in which the plaintiff, seeing the statute of limitations about to run out, received an order extending the time for filing a complaint but failed to serve defendant with civil summons and the order. The defective service of process discontinued plaintiff's original action, and the trial court properly treated the voluntary dismissal as if it had never been filed and the statute of limitations as if it had not been tolled. Plaintiff's second complaint, therefore, constituted a new action which plaintiff failed to file within the three years required by the statute of limitations. Latham v. Cherry, 111 N.C. App. 871, 433 S.E.2d 478 (1993), cert. denied, 335 N.C. 556, 441 S.E.2d 116 (1994).

Applied in Chaplain v. Chaplain, 101 N.C. App. 557, 400 S.E.2d 121 (1991).

Stated in Saieed v. Bradshaw, 110 N.C. App. 855, 431 S.E.2d 233 (1993).

Cited in Morrow v. Morrow, 103 N.C. App. 787, 407 S.E.2d 286 (1991); Lusk v. Crawford Paint Co., 106 N.C. App. 292, 416 S.E.2d 207 (1992); Clark v. Velsicol Chem. Corp., 110 N.C. App. 803, 431 S.E.2d 227 (1993); Food Serv. Specialists v. Atlas Restaurant Mgt., Inc., 111 N.C. App. 257, 431 S.E.2d 878 (1993); In re Estate of Neisen, 114 N.C. App. 82, 440 S.E.2d 855 (1994).

Rule 4. Process.

(a) *Summons — Issuance; who may serve.* — Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days. The complaint and summons shall be delivered to some proper person for service. In this State, such proper person shall be the sheriff of the county where service is to be made or some other person duly authorized by law to serve summons. Outside this State, such proper person shall be anyone who is not a party and is not less than 21 years of age or anyone duly authorized to serve summons by the law of the place where service is to be made. Upon request of the plaintiff separate or additional summons shall be issued against any defendants. A summons is issued when, after being filled out and dated, it is signed by the officer having authority to do so. The date the summons bears shall be prima facie evidence of the date of issue.

(b) *Summons — Contents.* — The summons shall run in the name of the State and be dated and signed by the clerk, assistant clerk, or deputy clerk of the court in the county in which the action is commenced. It shall contain the title of the cause and the name of the court and county wherein the action has been commenced. It shall be directed to the defendant or defendants and shall notify each defendant to appear and answer within 30 days after its service upon him and further that if he fails so to appear, the plaintiff will apply to the court for the relief demanded in the complaint. It shall set forth the name and address of plaintiff's attorney, or if there be none, the name and address of plaintiff. If a request for admission is served with the summons, the summons shall so state.

(c) *Summons — Return.* — Personal service or substituted personal service of summons as prescribed by Rule 4(j)(1) a and b must be made within 30 days after the date of the issuance of summons, except that in tax and assessment foreclosures under G.S. 47-108.25 or G.S. 105-374 the time allowed for service is 60 days. When a summons has been served upon every party named in the summons, it shall be returned immediately to the clerk who issued it, with notation thereon of its service.

Failure to make service within the time allowed or failure to return a summons to the clerk after it has been served on every party named in the summons shall not invalidate the summons. If the summons is not served within the time allowed upon every party named in the summons, it shall be returned immediately upon the expiration of such time by the officer to the clerk of the court who issued it with notation thereon of its nonservice and the reasons therefor as to every such party not served, but failure to comply with this requirement shall not invalidate the summons.

(d) *Summons — Extension; endorsement, alias and pluries.* — When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by either of the following methods of extension:

(1) The plaintiff may secure an endorsement upon the original summons for an extension of time within which to complete service of process. Return of the summons so endorsed shall be in the same manner as the original process. Such endorsement may be secured within 90 days after the issuance of summons or the date of the last prior endorsement, or

(2) The plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement.

Provided, in tax and assessment foreclosures under G.S. 47-108.25 and G.S. 105-374, the first endorsement may be made at any time within two years after the issuance of the original summons, and subsequent endorsements may thereafter be made as in other actions; or an alias or pluries summons may be sued out at any time within two years after the issuance of the original summons, and after the issuance of such alias or pluries summons, the chain of summonses may be kept up as in any other action.

Provided, further, the methods of extension may be used interchangeably in any case and regardless of the form of the preceding extension.

(e) *Summons — Discontinuance.* — When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.

(f) *Summons — Date of multiple summonses.* — If the plaintiff shall cause separate or additional summonses to be issued as provided in Rule 4(a), the date of issuance of such separate or additional summonses shall be considered the same as that of the original summons for purposes of endorsement or alias summons under Rule 4(d).

(g) *Summons — Docketing by clerk.* — The clerk shall keep a record in which he shall note the day and hour of issuance of every summons, whether original, alias, pluries, or endorsement thereon. When the summons is returned, the clerk shall note on the record the date of the return and the fact as to service or non-service.

(h) *Summons — When proper officer not available.* — If at any time there is not in a county a proper officer, capable of executing process, to whom summons or other process can be delivered for service, or if a proper officer refuses or neglects to execute such process, or if such officer is a party to or otherwise interested in the action or proceeding, the clerk of the issuing court, upon the facts being verified before him by written affidavit of the plaintiff or his agent or attorney, shall appoint some suitable person who, after he accepts such process for service, shall execute such process in the same manner, with like effect, and subject to the same liabilities, as if such person were a proper officer regularly serving process in that county.

(h1) *Summons — When process returned unexecuted.* — If a proper officer returns a summons or other process unexecuted, the plaintiff or his agent or attorney may cause service to be made by anyone who is not less than 21 years of age, who is not a party to the action, and who is not related by blood or marriage to a party to the action or to a person upon whom service is to be made. This subsection shall not apply to executions pursuant to Article 28 of Chapter 1 or summary ejectment pursuant to Article 3 of Chapter 42 of the General Statutes.

(i) *Summons — Amendment.* — At any time, before or after judgment, in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued.

(j) *Process — Manner of service to exercise personal jurisdiction.* — In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:

(1) Natural Person. — Except as provided in subsection (2) below, upon a natural person:

a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

(2) Natural Person under Disability. — Upon a natural person under disability by serving process in any manner prescribed in this section (j) for service upon a natural person and, in addition, where required by paragraph a or b below, upon a person therein designated.

a. Where the person under disability is a minor, process shall be served separately in any manner prescribed for service upon a natural person upon a parent or guardian having custody of the child, or if there be none, upon any other person having the care and control of the child. If there is no parent, guardian, or other person having care and control of the child when service is made upon the child, then service of process must also be made upon a guardian ad litem who has been appointed pursuant to Rule 17.

b. If the plaintiff actually knows that a person under disability is under guardianship of any kind, process shall be served separately upon his guardian in any manner applicable and appropriate under this section (j). If the plaintiff does not actually know that a guardian has been appointed when service is made upon a person known to him to be incompetent to have charge of his affairs, then service of process must be made upon a guardian ad litem who has been appointed pursuant to Rule 17.

(3) The State. — Upon the State by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney general or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General or to a deputy or assistant attorney general.

(4) An Agency of the State. —

a. Upon an agency of the State by personally delivering a copy of the summons and of the complaint to the process agent appointed by the agency in the manner hereinafter provided or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to said process agent.

b. Every agency of the State shall appoint a process agent by filing with the Attorney General the name and address of an agent upon whom process may be served.

c. If any agency of the State fails to comply with paragraph b above, then service upon such agency may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney general or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General, or to a deputy or assistant attorney general.

d. For purposes of this rule, the term "agency of the State" includes every agency, institution, board, commission, bureau, department, division, council, member of Council of State, or officer of the State government of the State of North Carolina, but does not include counties, cities, towns, villages, other municipal corporations or political subdivisions of the State, county or city boards of education, other local public districts, units, or bodies of any kind, or private corporations created by act of the General Assembly.

(5) Counties, Cities, Towns, Villages and Other Local Public Bodies. —

a. Upon a city, town, or village by personally delivering a copy of the summons and of the complaint to its mayor, city manager or clerk or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its mayor, city manager or clerk.

b. Upon a county by personally delivering a copy of the summons and of the complaint to its county manager or to the chairman, clerk or any member of the board of commissioners for such county or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its county manager or to the chairman, clerk, or any member of this board of commissioners for such county.

c. Upon any other political subdivision of the State, any county or city board of education, or other local public district, unit, or body of any kind (i) by personally delivering a copy of the summons and of the complaint to an officer or director thereof, or (ii) by personally delivering a copy of the summons and of the complaint to an agent or attorney-in-fact authorized by appointment or by statute to be served or to accept service in its behalf, or (iii) by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director, agent, or attorney-in-fact as specified in (i) and (ii).

d. In any case where none of the officials, officers or directors specified in paragraphs a, b and c can, after due diligence, be found in the State, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof, such court or judge may grant an order that service upon the party sought to be served may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or any deputy or assistant attorney general of the State of North Carolina, or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General or any deputy or assistant attorney general of the State of North Carolina.

(6) Domestic or Foreign Corporation. — Upon a domestic or foreign corporation:

a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service or [of] process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served as specified in paragraphs a and b.

(7) Partnerships. — Upon a general or limited partnership:

a. By delivering a copy of the summons and of the complaint to any general partner, or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf, or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to any general partner, or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf, or by leaving copies thereof in the office of such general partner, attorney-in-fact or agent with the person who is apparently in charge of the office.

b. If relief is sought against a partner specifically, a copy of the summons and of the complaint must be served on such partner as provided in this section (j).

(8) Other Unincorporated Associations and Their Officers. — Upon any unincorporated association, organization, or society other than a partnership:

a. By delivering a copy of the summons and of the complaint to an officer, director, managing agent or member of the governing body of the unincorporated association, organization or society, or by leaving copies thereof in the office of such officer, director, managing agent or member of the governing body with the person who is apparently in charge of the office; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director, agent or member of the governing body to be served as specified in paragraphs a and b.

(9) Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. § 1608.

(j1) *Service by publication on party that cannot otherwise be served.* — A party that cannot with due diligence be served by personal delivery or registered or certified mail may be served by publication. Except in actions involving jurisdiction in rem or quasi in rem as provided in section (k), service of process by publication shall consist of publishing a notice of service of process by publication once a week for three successive weeks in a newspaper that is qualified for legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and circulated in the area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending. If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(2), the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served.

The notice of service of process by publication shall (i) designate the court in which the action has been commenced and the title of the action, which title may be indicated sufficiently by the name of the first plaintiff and the first defendant; (ii) be directed to the defendant sought to be served; (iii) state either that a pleading seeking relief against the person to be served has been filed or has been required to be filed therein not later than a date specified in the notice; (iv) state the nature of the relief being sought; (v) require the defendant being so served to make defense to such pleading within 40 days after a date stated in the notice, exclusive of such date, which date so stated shall be the date of the first publication of notice, or the date when the complaint is required to be filed, whichever is later, and notify the defendant that upon his failure to do so the party seeking service of process by publication will apply to the court for the relief sought; (vi) in cases of attachment, state the information required by G.S. 1-440.14; (vii) be subscribed by the party seeking service or his attorney and give the post-office address of such party or his attorney; and (viii) be substantially in the following form:

NOTICE OF SERVICE OF PROCESS BY PUBLICATION
STATE OF NORTH CAROLINA ____________ COUNTY

In the ____________ Court

[Title of action or special proceeding] To [Person to be served]:

Take notice that a pleading seeking relief against you (has been filed) (is required to be filed not later than __________, 19____) in the

above-entitled (action) (special proceeding). The nature of the relief being sought is as follows:
(State nature.)

You are required to make defense to such pleading not later than (________, 19____) and upon your failure to do so the party seeking service against you will apply to the court for the relief sought.

This, the ________ day of ________, 19____

__________ (Attorney) (Party)
__________ (Address)

(j2) *Proof of service.* — Proof of service of process shall be as follows:

(1) Personal Service. — Before judgment by default may be had on personal service, proof of service must be provided in accordance with the requirements of G.S. 1-75.10(1).

(2) Registered or Certified Mail. — Before judgment by default may be had on service by registered or certified mail, the serving party shall file an affidavit with the court showing proof of such service in accordance with the requirements of G.S. 1-75.10(4). This affidavit together with the return receipt signed by the person who received the mail if not the addressee raises a presumption that the person who received the mail and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process or was a person of suitable age and discretion residing in the addressee's dwelling house or usual place of abode. In the event the presumption described in the preceding sentence is rebutted by proof that the person who received the receipt at the addressee's dwelling house or usual place of abode was not a person of suitable age and discretion residing therein, the statute of limitation may not be pleaded as a defense if the action was initially commenced within the period of limitation and service of process is completed within 60 days from the date the service is declared invalid. Service shall be complete on the day the summons and complaint are delivered to the address.

(3) Publication. — Before judgment by default may be had on service by publication, the serving party shall file an affidavit with the court showing the circumstances warranting the use of service by publication, information, if any, regarding the location of the party served which was used in determining the area in which service by publication was printed and proof of service in accordance with G.S. 1-75.10(2).

(j3) *Service in a foreign country.* — Unless otherwise provided by federal law, service upon a defendant, other than an infant or an incompetent person, may be effected in a place not within the United States:

(1) By any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) If there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

a. In the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

b. As directed by the foreign authority in response to a letter rogatory or letter of request; or

c. Unless prohibited by the law of the foreign country, by

1. Delivery to the individual personally of a copy of the summons and the complaint and, upon a corporation, partnership, association or other such entity, by delivery to an officer or a managing or general agent;

2. Any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) By other means not prohibited by international agreement as may be directed by the court.

Service under subdivision (2)c.1. or (3) of this subsection may be made by any person authorized by subsection (a) of this Rule or who is designated by order of the court or by the foreign court.

On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service. Proof of service may be made as prescribed in G.S. 1-75.10, by the order of the court, or by the law of the foreign country.

Proof of service by mail shall include an affidavit or certificate of addressing and mailing by the clerk of court.

(j4) *Process or judgment by default not to be attacked on certain grounds.* — No party may attack service of process or a judgment of default on the basis that service should or could have been effected by personal service rather than service by registered or certified mail. No party that receives timely actual notice may attack a judgment by default on the basis that the statutory requirement of due diligence as a condition precedent to service by publication was not met.

(j5) *Personal jurisdiction by acceptance of service.* — Any party personally, or through the persons provided in Rule 4(j), may accept service of process by notation of acceptance of service together with the signature of the party accepting service and the date thereof on an original or copy of a summons, and such acceptance shall have the same force and effect as would exist had the process been served by delivery of copy and summons and complaint to the person signing said acceptance.

(k) *Process — Manner of service to exercise jurisdiction in rem or quasi in rem.* — In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for the exercise of jurisdiction in rem or quasi in rem as provided in G.S. 1-75.8, the manner of service of process shall be as follows:

(1) Defendant Known. — If the defendant is known, he may be served in the appropriate manner prescribed for service of process in section (j), or, if otherwise appropriate section (j1); except that the requirement for service by publication in (j1) shall be satisfied if made in the county where the action is pending and proof of service is made in accordance with section (j2).

(2) Defendant Unknown. — If the defendant is unknown, he may be designated by description and process may be

served by publication in the manner provided in section (j1), except that the requirement for service by publication in (j1) shall be satisfied if made in the county where the action is pending and proof of service is made in accordance with section (j2). (1967, c. 954, s. 1; 1969, c. 895, ss. 1-4; 1971, c. 962; c. 1156, s. 2; 1975, cc. 408, 609; 1977, c. 910, ss. 1-3; 1981, c. 384, s. 3; c. 540, ss. 1-8; 1983, c. 679, ss. 1, 2; 1989, c. 330; c. 575, ss. 1, 2; 1995, c. 275, s. 1; c. 389, ss. 2, 3; c. 509, s. 135.1(e), (f).)

Local Modification. — Wake: 1995, c. 441, s. 1 (expires July 1, 1997).

Editor's Note. —

The subdivision (j)(9) designation was assigned by the Revisor of Statutes, the designation in Session Laws 1995, c. 389, s. 2 having been (j)(10).

Effect of Amendments. — Session Laws 1995, c. 275, s. 1, effective October 1, 1995, and applicable to actions that are filed or have not reached final judgment on or after that date, added subsection (h1).

Session Laws 1995, c. 389, ss. 2 and 3, effective October 1, 1995, and applicable to civil actions filed on or after that date, added subdivision (j)(10); and rewrote subsection (j3).

Session Laws 1995, c. 509, s. 135.1(e) and (f), effective July 29, 1995, substituted "G.S. 105-374" for "G.S. 105-414" in subsection (c); and substituted "G.S. 47-108.25 and G.S. 105-374" for "G.S. 105-391 and G.S. 105-414" in subsection (d).

CASE NOTES

I. In General.
II. Personal Service on Natural Persons.
  A. In General.
  C. Service by Registered or Certified Mail.
IV. Service on Corporations.
V. Service by Publication.
VI. Amendment of Summons.
VII. Discontinuance and Extensions.

I. IN GENERAL.

Summons Must Be Served Within 30 Days. — Under this rule, a summons must be served within 30 days of its issuance. Dozier v. Crandall, 105 N.C. App. 74, 411 S.E.2d 635, cert. denied, 332 N.C. 480, 420 S.E.2d 826 (1992).

Where summons is not served within the statutory period, etc. —

A summons not served within 30 days loses its vitality and becomes functus officio, and service obtained thereafter does not confer jurisdiction on the trial court over the defendant. Dozier v. Crandall, 105 N.C. App. 74, 411 S.E.2d 635, cert. denied, 332 N.C. 480, 420 S.E.2d 826 (1992).

Although a summons not served within 30 days becomes dormant and unservable, under Rule 4(c) it is not invalidated nor is the action discontinued. Dozier v. Crandall, 105 N.C. App. 74, 411 S.E.2d 635, cert. denied, 332 N.C. 480, 420 S.E.2d 826 (1992).

Irregularity in Summons. — Where there was no confusion as to the identity of the actual defendant, as evidenced by the complaint and the caption of the summons, a slight irregularity was not fatal because the summons was properly directed to the city, and the city was properly named as the defendant. Steffey v. Mazza Constr. Group, Inc., 113 N.C. App. 538, 439 S.E.2d 241, cert. improvidently granted and appeal dismissed, 339 N.C. 734, 455 S.E.2d 155 (1995).

Neglect Required for Appointment of Private Process Server. — Something more than mere failure to act is needed for conduct to constitute neglect under paragraph (h) of this rule. Williams v. Williams, 113 N.C. App. 226, 437 S.E.2d 884 (1994), aff'd, 339 N.C. 608, 453 S.E.2d 165 (1995).

Defense of Insufficient Service on "John Doe" Defendant Not Available to Insurance Company. — Where respondent was provided with appropriate notice of the action below, it could not attempt to defend its prior election not to provide a defense to a John Doe defendant by alleging that service of process on "John Doe" was insufficient. Sparks v. Nationwide Mut. Ins. Co., 99 N.C. App. 148, 392 S.E.2d 415 (1990).

Issuance of Second Summons. — Although summons was not properly issued at first, the issuance of a second summons commenced a new action on the date it was issued. Duncan v. Duncan, 102 N.C. App. 107, 401 S.E.2d 398 (1991).

60 Day "Saving Provision" in Subdivision (j2)(2). — A careful review of this saving provision indicates it is limited in scope and may only be employed where: (1) the original service was made by registered or certified mail upon a person residing in the addressee's dwelling house or usual place of abode; and (2) it later appears "the person who received the receipt at the addressee's dwelling house or usual place of abode was not a person of suitable age and discretion residing therein." Hanover Ins. Co. v. Amana Refrigeration, Inc., 106 N.C. App. 79, 415 S.E.2d 99, cert. denied, 332 N.C. 344, 421 S.E.2d 147 (1992).

The circumstance of the summons being placed in the court file subsequent to entry of judgment by default is insufficient to affect validity of either the summons or the judgment itself. Hocke v. Hanyane, 118 N.C. App. 630, 456 S.E.2d 858 (1995).

Applied in In re Adoption of P.E.P., 100 N.C. App. 191, 395 S.E.2d 133 (1990); Warzynski v. Empire Comfort Sys., 102 N.C. App. 222, 401 S.E.2d 801 (1991); In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991); Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148, 437 S.E.2d 699 (1993).

Quoted in Williamson v. Savage, 104 N.C. App. 188, 408 S.E.2d 754 (1991); McArdle Corp. v. Patterson, 115 N.C. App. 528, 445 S.E.2d 604 (1994).

Stated in Taylor v. Brinkman, 108 N.C. App. 767, 425 S.E.2d 429 (1993); Jones v. Summers, 117 N.C. App. 415, 450 S.E.2d 920 (1994).

Cited in Lusk v. Crawford Paint Co., 106 N.C. App. 292, 416 S.E.2d 207 (1992); Nissan Div. of Nissan Motor Corp. in United States v. Nissan, 111 N.C. App. 748, 434 S.E.2d 224 (1993); In re Baby Boy Dixon, 112 N.C. App. 248, 435 S.E.2d 352 (1993); Storey v. Hailey, 114 N.C. App. 173, 441 S.E.2d 602 (1994).

II. PERSONAL SERVICE ON NATURAL PERSONS.

A. In General.

Rebuttable Presumption, etc. — When the officer's return of the summons shows legal service a presumption of valid service of process is created. Greenup v. Register, 104 N.C. App. 618, 410 S.E.2d 398 (1991).

Same — Service of Summons Prerequisite to Individual Liability. — General partner who was not made a party to the defendant's counterclaim or served with a copy of a summons, could not be held personally liable for a judgment against the partnership. Post & Front Properties, Ltd. v. Roanoke Constr. Co., 117 N.C. App. 93, 449 S.E.2d 765 (1994).

Actions Constituting Effectual Service. — Evidence was sufficient to find that the plaintiff exercised due diligence in attempting to ascertain the address or whereabouts of defendant where plaintiff's counsel attempted service at two available addresses, consulted the local telephone directory and the department of motor vehicles to obtain information, contacted the defendant's insurer and attorney seeking information as to defendant's whereabouts and finally wrote the California Department of Motor Vehicles based on a statement by defendant's sister that he was "out west, possibly California." Winter v. Williams, 108 N.C. App. 739, 425 S.E.2d 458 (1993).

C. Service by Registered or Certified Mail.

Service by Certified Letter Insufficient. — Where plaintiff's sole attempt at personal service of notice consisted of a certified letter mailed to the business address of a partnership, a postal box number, this solitary venture constituted neither application of "due diligence" as required by subsection (j1) nor a "reasonable and diligent effort" as required by § 45-21.16(a). Barclays American/Mortgage Corp. v. BECA Enters., 116 N.C. App. 100, 446 S.E.2d 883 (1994).

Service in Foreign Countries. — Service of summons addressed to the defendant in care of his mother at an address in South Africa, the home of defendant's brother, was sufficient where clerk's certificate reflected that the return receipt indicated the complaint and summons were in fact received at the stated address by the individual whose signature appeared thereon. Hocke v. Hanyane, 118 N.C. App. 630, 456 S.E.2d 858 (1995).

IV. SERVICE ON CORPORATIONS.

Substitute Service Improper. — Where plaintiff's attorney had actual knowledge of an address where defendant could be served and did not attempt to serve defendant at the known address, substitute service of process on the Secretary of State was ineffective and violated defendant's due process rights. Interior Distribs., Inc. v. Hartland Constr. Co., 116 N.C. App. 627, 449 S.E.2d 193 (1994).

V. SERVICE BY PUBLICATION.

Publication in County Where Action Is Pending. — Whereas defendant's last know address was in Wake County and despite reasonable efforts, plaintiff had "no reliable information" as to the defendant's whereabouts, publication was proper in the county in which the action was pending. Winter v. Williams, 108 N.C. App. 739, 425 S.E.2d 458 (1993).

VI. AMENDMENT OF SUMMONS.

The power of the court to allow amendment of process is discretionary and permits amendment to correct a misnomer or mistake in the name of a party. Franklin v. Winn Dixie Raleigh, Inc., 117 N.C. App. 28, 450 S.E.2d 24 (1994).

Amendment Improper. — The named defendant in the original summons and complaint, "Winn Dixie Store, Inc.", was not a mistake or misdescription permitting the amendment of the summons where the name was the correct name of the wrong corporate party defendant, this was a substantive mistake which was fatal to the action. Franklin v. Winn Dixie Raleigh, Inc., 117 N.C. App. 28, 450 S.E.2d 24 (1994).

Amendment Held Appropriate — Trial court failed to exercise its discretion in denying plaintiff's motion to amend his summons under subsection (1) to substitute the correct county on the summons when there was no showing of any material prejudice to defendants; therefore the case was remanded to the Court of Appeals. Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995).

VII. DISCONTINUANCE AND EXTENSIONS.

Extensions, Generally. —

This rule specifically provides that where there is neither endorsement nor issuance of alias or pluries summons within 90 days after issuance of the last preceding summons, the action is discontinued as to any defendant not served within the time allowed and treated as if it had never been filed. Dozier v. Crandall, 105 N.C. App. 74, 411 S.E.2d 635, cert. denied, 332 N.C. 480, 420 S.E.2d 826 (1992).

"Discontinuance" is a term of art whose only application in the context of service of process is to an action that must cease for failure of the party to comply with section (d) of this rule. Thereafter a new action may be filed, but the date for purposes of the statute of limitations is that of the later filing. Snead v. Foxx, 329 N.C. 669, 406 S.E.2d 829 (1991).

Discontinuance on Failure to Secure Extension of Time for Service. — Where plaintiff, presented with the return of her summons unserved, failed to continue her action by securing an endorsement upon the original summons for an extension of time within which to complete service of process pursuant to subsection (d)(1) of this rule, and did not sue out an alias or pluries summons returnable in the same manner as the original process pursuant to subsection (d)(2), the plaintiff's action was consequently discontinued 90 days after the date the original summons was issued. Snead v. Foxx, 329 N.C. 669, 406 S.E.2d 829 (1991), holding that plaintiff's action was barred by the statute of limitations.

Service of Dormant Summons. — Where defendant was served with a dormant summons within the 90-day limit, rather than notice of a discontinued action, the trial court had the authority pursuant to the language of subsection (b) to extend the time for service of process under subsection (c), "to permit the act to be done where the failure to do the act was the result of excusable neglect." Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994).

Allowance of Voluntary Dismissal Held Nugatory. —

A voluntary dismissal of negligence action without prejudice did not toll the statute of limitations in a case in which the plaintiff, seeing the statute of limitations about to run, received an order extending the time for filing a complaint but failed to serve defendant with civil summons and the order. The defective service of process discontinued plaintiff's original action, and the trial court properly treated the voluntary dismissal as if it had never been filed and the statute of limitations as if it had not been tolled. Plaintiff's second complaint, therefore, constituted a new action which plaintiff failed to file within the three years required by the statute of limitations. Latham v. Cherry, 111 N.C. App. 871, 433 S.E.2d 478 (1993), cert. denied, 335 N.C. 556, 441 S.E.2d 116 (1994).

OPINIONS OF ATTORNEY GENERAL

Summary Ejectment Proceedings. — Because § 7A-217(4) states that the procedure found in § 42-29 can be used in summary ejectment cases only, and because summary ejectment is in the nature of an in rem proceeding, an in personam money damages claim cannot be heard and a money judgment cannot be entered in an action where service of process is effected through the alternative method under § 42-29. The requirements for actual service of process found elsewhere in G.S. § 7A-213 and in this rule would still apply to the claim for rents and other money damages. See opinion of Attorney General to Hon. Thomas N. Hix, Chief District Court Judge, 29th Judicial Circuit, 60 N.C.A.G. 95 (1992).

Rule 5. Service and filing of pleadings and other papers.

(a) *Service — When required.* — Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(b) *Service — How made.* — A pleading setting forth a counterclaim or cross claim shall be filed with the court and a copy thereof shall be served on the party against whom it is asserted or on his attorney of record. With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided for service and return of process in Rule 4 and may be made upon either the party or, unless service upon the party himself is ordered by the court, upon his attorney of record. With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by filing it with the clerk of court. Delivery of a copy within this rule means handing it to the attorney or to the party; or leaving it at the attorney's office with a partner or employee. Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(c) *Service — Numerous defendants.* — In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any crossclaim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) *Filing.* — All pleadings subsequent to the complaint shall be filed with the court. All other papers required to be served upon a party, including requests for admissions, shall be filed with the court either before service or within five days thereafter, except that depositions, interrogatories, requests for documents, and answers and responses to those requests may not be filed unless ordered by the court or until used in the proceeding. The party taking a deposition or obtaining material through discovery is responsible for its preservation and delivery to the court if needed or so ordered. With respect to all pleadings and other papers as to which service and return has not been made in the manner provided in Rule 4, proof of service shall be made by filing with the court a certificate either by the attorney or the party that the paper was served in the manner prescribed by this rule, or a certificate of acceptance of service by the attorney or the party to be served. Such certificate shall show the date and method of service or the date of acceptance of service.

(e)(1) *Filing with the court defined.* — The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(2) *Filing by telefacsimile transmission.* — If, pursuant to G.S. 7A-34 and G.S. 7A-343, the Supreme Court and the Administrative Officer of the Courts establish uniform rules, regulations, procedures and specifications for the filing of pleadings or other court papers by telefacsimile transmission, filing may be made by the transmission when, in the manner, and to the extent provided therein. (1967, c. 954, s. 1; 1971, c. 538; c. 1156, s. 2.5; 1975, c. 762, s. 1; 1983, c. 201, s. 1; 1985, c. 546; 1991, c. 168, s. 1.)

CASE NOTES

Cited in Gummels v. North Carolina Dep't of Human Resources, 98 N.C. App. 675, 392 S.E.2d 113 (1990); Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993).

Rule 6. Time.

CASE NOTES

I. In General.
II. Enlargement of Time.
III. Effect of Expiration of Session.
IV. Service of Motions and Affidavits.
V. Additional Time after Service by Mail.

I. IN GENERAL.

Applied in Johnson v. Hutchens, 103 N.C. App. 384, 405 S.E.2d 597 (1991); Hackett v. Bonta, 113 N.C. App. 89, 437 S.E.2d 687 (1993); Evans v. Full Circle Prods., Inc., 114 N.C. App. 777, 443 S.E.2d 108 (1994).

Cited in Huntington Manor v. North Carolina Dep't of Human Resources, 99 N.C. App. 52, 393 S.E.2d 104 (1990); Chaplain v. Chaplain, 101 N.C. App. 557, 400 S.E.2d 121 (1991); Crowell Constructors, Inc. v. State ex rel. Cobey, 114 N.C. App. 75, 440 S.E.2d 848 (1994); Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994).

II. ENLARGEMENT OF TIME.

Failure to File Within Extended Time. — Where plaintiffs filed for an extension of time to file their complaint for medical malpractice and loss of consortium, which the court granted, but plaintiffs did not file their complaint until 19 days later, when plaintiffs failed to file their complaint before the extension of time expired, their action abated, and the three-year statute of limitations had run. The trial court could not extend the time in which to file their complaint under section (b) of this Rule, thus reviving the original action and avoiding the statute of limitations. Osborne v. Walton, 110 N.C. App. 850, 431 S.E.2d 496 (1993).

III. EFFECT OF EXPIRATION OF SESSION.

This rule clearly allows a written order to be signed out of term, especially when such an act merely documents a decision made and announced before the expiration of the term. Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981); Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994).

This rule clearly allows a superior court judge to sign a written order out of session without the consent of the parties so long as the hearing to which the order relates was held in term. Ward v. Ward, 116 N.C. App. 643, 448 S.E.2d 862 (1994).

Entry of Orders Out of Session. — Judges did not lack subject matter jurisdiction to enter equitable distribution judgment and permanent alimony order where both were entered out of session. Ward v. Ward, 116 N.C. App. 643, 448 S.E.2d 862 (1994).

There was both statutory and common law authority for the trial court's entry of its supplemental judgment, because § 7A-47.1 and this rule both authorize the entry of judgment out of session. Buford v. GMC, 339 N.C. 396, 451 S.E.2d 293 (1994).

IV. SERVICE OF MOTIONS AND AFFIDAVITS.

Section (d) of this rule relates only to the hearing of motions. In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. dismissed, 331 N.C. 748, 417 S.E.2d 236 (1992).

Extension of Time for Filing Affidavits Supporting Summary Judgment. — Despite the specific language of § 1A-1, Rule 56(c) requiring affidavits to be filed prior to the day of hearing, the trial court may in some instances permit the filing of the affidavits at a later time. If a request for permission to file affidavits at some later time is made before the date of the summary judgment hearing, the trial court may in its discretion order the period for filing affidavits to be enlarged. Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

Filing of Affidavits on Day of Summary Judgment Hearing. — If a request for permission to file affidavits in support of a motion under § 1A-1, Rule 56 is made on the day of the summary judgment hearing, the trial court may permit the act to be done where the failure to act was the result of excusable neglect. Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

Where there was no request for enlargement of time within which to file and serve any affidavits made by the plaintiff prior to the day of the hearing of the motion on summary judgment and there was no finding or a request by the plaintiff for a finding of excusable neglect in failing to serve the affidavits prior to the date of the summary judgment hearing, because the plaintiff failed to proceed in a manner that would permit the trial court to exercise its discretion to permit the filing of plaintiff's proffered affidavit, the plaintiff could not on appeal complain about its exclusion. Battle

v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

V. ADDITIONAL TIME AFTER SERVICE BY MAIL.

Editor's Note. *— The annotation under the catchline "Section (e) Held Inapplicable" in the main volume under this section should read:*

Section (e) Held Inapplicable. — Plaintiff's motions for entry of default and default judgment, which were filed 31 days after service of summons and complaint on defendant, were made after defendant's time to answer had expired, as although summons and complaint were served upon defendant by mail, section (e) of this rule did not apply to extend his time to answer to 33 days, because the 30 days defendant had under § 1A-1, Rule 12 to answer the complaint began running when defendant was served with the summons and complaint, not when plaintiff mailed it. Williams v. Moore, 95 N.C. App. 601, 383 S.E.2d 416 (1989).

No Reversible Error Where Defendants Not Prejudiced by Untimely Notice. — Trial court did not commit reversible error in granting summary judgment in favor of plaintiff although plaintiff failed to give timely notice to appellants of said motion pursuant to section (e) of this rule and § 1A-1, Rule 56(c). Plaintiff conceded that the Notice of the Summary Judgment Hearing was served by mail only nine days prior to the hearing instead of 13 days as required; however, defendants failed to demonstrate any prejudice caused them by the untimely notice. Symons Corp. v. Quality Concrete Constr., Inc., 108 N.C. App. 17, 422 S.E.2d 365 (1992).

ARTICLE 3.

Pleadings and Motions.

Rule 7. Pleadings allowed; form of motions.

CASE NOTES

I. In General.
II. Pleadings.
III. Motions and Other Papers.

I. IN GENERAL.

Applied in Tay v. Flaherty, 100 N.C. App. 51, 394 S.E.2d 217 (1990).

Stated in Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Cited in Curtis v. Curtis, 104 N.C. App. 625, 410 S.E.2d 917 (1991); Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993); Crowell Constructors, Inc. v. State ex rel. Cobey, 114 N.C. App. 75, 440 S.E.2d 848 (1994).

II. PLEADINGS.

Joining Request for Equitable Distribution in a Reply. — A plaintiff in a divorce action may admit to a claim for equitable distribution in a reply, and join in the claims for an equitable distribution of the marital property through a reply pleading. The defendant is precluded, by principles of equitable estoppel, from defeating plaintiff's right to equitable distribution by submitting to a voluntary dismissal of his counterclaim. Hunt v. Hunt, 117 N.C. App. 280, 450 S.E.2d 558 (1994).

III. MOTIONS AND OTHER PAPERS.

Waiver of Notice. — Where the content of plaintiff's notice of hearing to modify custody, seeking "such relief as to the court may seem just and proper," was insufficient to comply with the requirement that the motion state the grounds therefor and the relief or order sought, but defendant's attorney failed to object, defendant waived proper notice of plaintiff's motion to modify custody. Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993).

Name and Number of Rule, etc. — While failure to give the number of the rule under which a motion is made is not necessarily fatal, the grounds for the motion and the relief sought must be consistent with the Rules of Civil Procedure. Gallbronner v. Mason, 101 N.C. App. 362, 399 S.E.2d 139, cert. denied, 329 N.C. 268, 407 S.E.2d 835 (1991), appeal dismissed, 333 N.C. 167, 399 S.E.2d 139 (1992).

Trial court erred in granting a motion captioned "Motion to Forfeit Security Deposit" in a landlord-tenant dispute, where the motion was in essence an attempt to amend the complaint, which made no reference to a security deposit, and judgment had been entered in the case. Gallbronner v. Mason, 101 N.C. App. 362, 399 S.E.2d 139, cert. denied, 329 N.C. 268, 407 S.E.2d 835 (1991), appeal dismissed, 333 N.C. 167, 399 S.E.2d 139 (1992).

Timeliness of Responsive Pleading. — Although plaintiff had no right to file a responsive pleading to the answer under this rule, plaintiff did have a continuing duty to review the appropriateness of persisting in litigating a claim which was alleged to be time-barred. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Rule 8. General rules of pleadings.

CASE NOTES

I. In General.
II. Pleadings; Generally.
III. Affirmative Defenses.

I. IN GENERAL.

Taken together, § 1A-1, Rule 12(b)(6) and section (a) of this rule suggest pleadings should be limited to those facts or descriptions of transactions, occurrences, or series of transactions or occurrences, intended to be proved. Bowlin v. Duke Univ., 108 N.C. App. 145, 423 S.E.2d 320 (1992), cert. denied, 333 N.C. 461, 427 S.E.2d 618 (1993).

Purpose of Section (a). — The purpose of section (a) is to establish that the plaintiff will be entitled to some form of relief should he prevail on the claim raised by the factual allegations in his complaint. Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

Sanctions for Violations. — Although a dismissal with prejudice pursuant to subsection (b) is available as a sanction for a violation of subdivision (a)(2), it is not the only available sanction and should be imposed only where the trial court determines that less drastic sanctions are insufficient; therefore, the trial court did not err in only striking the punitive damages award in the slander case as a sanction. McLean v. Mechanic, 116 N.C. App. 271, 447 S.E.2d 459 (1994), review denied, 339 N.C. 738, 454 S.E.2d 654, cert. denied, 339 N.C. 738, 454 S.E.2d 653 (1995).

Applied in Oxendine v. Bowers, 100 N.C. App. 712, 398 S.E.2d 57 (1990); Wallace v. Haserick, 105 N.C. App. 315, 412 S.E.2d 694 (1992); Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193 (1992); Lewis v. Blackman, 116 N.C. App. 414, 448 S.E.2d 133 (1994); Hunt v. Hunt, 117 N.C. App. 280, 450 S.E.2d 558 (1994); Miller v. Talton, 112 N.C. App. 484, 435 S.E.2d 793 (1993).

Stated in Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Cited in Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991); Estridge v. Ford Motor Co., 101 N.C. App. 716, 401 S.E.2d 85 (1991); Metric Constructors, Inc. v. Industrial Risk Insurers, 102 N.C. App. 59, 401 S.E.2d 126 (1991); Fox v. Killian, 102 N.C. App. 819, 403 S.E.2d 546 (1991); Marler v. Amoco Oil Co., 793 F. Supp. 656 (E.D.N.C. 1992); Heart of Valley Motel, Inc. v. Edwards, 111 N.C. App. 896, 433 S.E.2d 466 (1993); Griffin v. Holmes, 843 F. Supp. 81 (E.D.N.C. 1993); Burwell v. Giant Genie Corp., 115 N.C. App. 680, 446 S.E.2d 126 (1994); Tipton & Young Constr. Co. v. Blue Ridge Structure Co., 116 N.C. App. 115, 446 S.E.2d 603, cert. granted, 338 N.C. 314, 450 S.E.2d 490 (1994); Byrd v. Arrowood, 118 N.C. App. 418, 455 S.E.2d 672 (1995).

II. PLEADINGS; GENERALLY.

Damages Governed by Evidence Presented. — There is a longstanding rule that damages in this state are governed by the evidence presented rather than the claim made for relief; the fact that the complaint contained a much lower figure than the amount awarded did not mean that the trial judge abused his discretion. Lovell v. Nationwide Mut. Ins. Co., 108 N.C. App. 416, 424 S.E.2d 181, aff'd in part; discretionary review improvidently granted in part, 334 N.C. 682, 435 S.E.2d 71 (1993).

Punitive Damages Need Not Be Specially Pled. — Where a pleading fairly apprises opposing parties of facts which will support an award of punitive damages, they may be recovered at trial without having been specially pleaded. Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

Allegations Sufficient to Give Rise to Punitive Damages Claim. — Where complaint alleged that defendant intentionally pointed a gun at the plaintiffs in an attempt to intimidate them, reached into plaintiff's vehicle and struggled with her, making contact with plaintiff infant and plaintiff mother in the process, the acts were intentional acts of the type giving rise to punitive damages. Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

Applicability of Subdivision (a)(2). — Subdivision (a)(2) does not apply to diversity cases in U.S. District Court, and therefore could not provide a basis for dismissal of diversity personal injury action. Creech v. Denning, 148 F.R.D. 545 (E.D.N.C. 1993).

Dismissal May Not Be Imposed Mechanically. — Although dismissal under subsection (a)(2) of this rule is within the discretion of the trial court, when the rule is violated such sanction may not be imposed mechanically. Because the drastic sanction of dismissal is not always the best sanction available to the trial court and is certainly not the only sanction available, dismissal is to be applied only when the trial court determines that less drastic sanctions will not suffice. Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992).

III. AFFIRMATIVE DEFENSES.

Failure to Plead Barred Issue on Appeal. — Defendants' failure to plead plaintiffs' contributory negligence case was a bar to this issue being raised on appeal. Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, 394 S.E.2d 643 (1990), discretionary review denied, 99 N.C. 587, 402 S.E.2d 824 (1991).

Failure to Plead Res Judicata. — The failure of the defendant to plead res judicata is not a bar to that issue being raised at hearing on summary judgment. County of Rutherford ex rel. Child Support Enforcement Agency ex rel. Hedrick v. Whitener, 100 N.C. App. 70, 394 S.E.2d 263 (1990).

Where a defendant does not raise an affirmative defense, etc. — A defendant may not take advantage of the provisions of the statute of frauds by a motion to dismiss for failure to state a claim upon which relief could be granted, which must be pleaded as an affirmative defense. Green v. Harbour, 113 N.C. App. 280, 437 S.E.2d 719 (1993).

Complaint Sufficient to Put Defendants on Notice of a Contract. — Complaint alleging, that there was an express contract between plaintiff and defendants for payment of funeral expenses was sufficient to put defendants on notice of a contract; therefore, where defendants did not specifically plead the affirmative defense of the statute of frauds as required by § 1A-1, Rule 8(c), it would not be available as a defense to the contract. Parrish Funeral Home v. Pittman, 104 N.C. App. 268, 409 S.E.2d 327 (1991).

Failure to Cite Statutory Statute of Limitations Provision. — Failure to plead § 1-52(16) by precise number and subdivision is not fatal under subsection (c) of this Rule. Bonestell v. North Topsail Shores Condominiums, Inc., 103 N.C. App. 219, 405 S.E.2d 222 (1991).

Effect of an Entry of Default. — The effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff's complaint and is prohibited from defending on the merits of the case. Spartan Leasing, Inc. v. Pollard, 101 N.C. App. 450, 400 S.E.2d 476 (1991).

Rule 9. Pleading special matters.

(a) *Capacity.* — Any party not a natural person shall make an affirmative averment showing its legal existence and capacity to sue. Any party suing in any representative capacity shall make an affirmative averment showing his capacity and authority to sue. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority

§ 1A-1, Rule 9(h) is set out twice. See notes.

of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) *Fraud, duress, mistake, condition of the mind.* — In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) *Conditions precedent.* — In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) *Official document or act.* — In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) *Judgment.* — In pleading a judgment, decision or ruling of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment, decision or ruling without setting forth matter showing jurisdiction to render it.

(f) *Time and place.* — For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) *Special damage.* — When items of special damage are claimed each shall be averred.

(h) **(Effective until January 1, 1997 upon approval of constitutional amendments)** Private statutes. — In pleading a private statute or right derived therefrom it is sufficient to refer to the statute by its title or the day of its ratification, and the court shall thereupon take judicial notice of it.

(h) **(Effective January 1, 1997 upon approval of constitutional amendments)** Private statutes. In pleading a private statute or right derived therefrom it is sufficient to refer to the statute by its title or the day of its ratification if ratified before January 1, 1996, or the date it becomes law if it becomes law on or after January 1, 1996, and the court shall thereupon take judicial notice of it.

(i) *Libel and slander.* —

(1) In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the claim for relief arose, but it is sufficient to state generally that the same was published or spoken concerning the plaintiff, and if such allegation is controverted, the plaintiff is bound to establish on trial that it was so published or spoken.

(2) The defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances.

(j) *Medical malpractice.* — Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

(1) The pleading specifically asserts that the medical care has

been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;

(2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or

(3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court of the county in which the cause of action arose may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension.

(k) *Punitive damages.* — A demand for punitive damages shall be specifically stated, except for the amount, and the aggravating factor that supports the award of punitive damages shall be averred with particularity. The amount of damages shall be pled in accordance with Rule 8. (1967, c. 954, s. 1; 1995, c. 20, s. 10; c. 309, s. 2; c. 514, s. 3.)

Editor's Note. — Session Laws 1995, c. 20, s. 17 provides that sections 1 through 16 of this act shall become effective only if the constitutional amendments proposed by Session Laws 1995, c. 5, ss. 1-2 are approved as provided by Session Laws 1995, c. 5, ss. 3-4, and if so approved, sections 1 through 16 shall become effective with respect to bills and joint resolutions passed in either house of the General Assembly on or after January 1, 1997.

Session Laws 1995, c. 309, which amended this section by adding subsection (j), in s. 3, provides that the amendment to this section is not intended, and shall not be construed, to enlarge or diminish the doctrine of res ipsa loquitur in medical malpractice claims.

Session Laws 1995, c. 514, s. 4, is a severability clause.

Effect of Amendments. — Session Laws 1995, c, 20, s. 10, effective on or after January 1, 1997 if constitutional amendments proposed by 1995, c. 5. ss. 1-2 are approved, inserted "if ratified before January 1, 1996, or the date it becomes law if it becomes law on or after January 1, 1996" in subsection (h).

Session Laws 1995, c. 309, s. 2, effective January 1, 1996, and applicable to actions filed on or after that date, added subsection (j).

Session Laws 1995, c. 514, s. 3, effective January 1, 1996, and applicable to claims for relief arising on or after that date, added subsection (k).

CASE NOTES

I. In General.
III. Fraud, Duress, Mistake, etc.
IV. Conditions Precedent.

I. IN GENERAL.

Applied in Moore v. Wykle, 107 N.C. App. 120, 419 S.E.2d 164, cert. denied, 332 N.C. 666, 424 S.E.2d 405 (1992); Sharp v. Teague, 113 N.C. App. 589, 439 S.E.2d 792 (1994).

Quoted in Brandis v. Lightmotive

Fatman, Inc., 115 N.C. App. 59, 443 S.E.2d 887 (1994).

Cited in George Shinn Sports, Inc. v. Bahakel Sports, Inc., 99 N.C. App. 481, 393 S.E.2d 580 (1990); Fox v. Killian, 102 N.C. App. 819, 403 S.E.2d 546 (1991); Bonestell v. North Topsail Shores Condominiums, Inc., 103 N.C. App. 219, 405 S.E.2d 222 (1991).

III. FRAUD, DURESS, MISTAKE, ETC.

Insufficient Allegation of Fraud Subjects Plaintiff to Summary Judgment. — Plaintiff cannot simply allege fraud and thereby escape summary judgment; therefore, where plaintiff asserted defendant never intended to honor its obligations, dismissal of the issue was appropriate. Strum v. Exxon Co., 15 F.3d 327 (4th Cir. 1994).

Fraud by Corporation. —

Plaintiff's claim that corporation fraudulently induced him to purchase property and execute a note did not meet the particularity requirements because there was no allegation that the representations which the corporation's agent made were false or that the agent either knew them to be false or made them with reckless indifference to the truth. Trull v. Central Carolina Bank & Trust Co., 117 N.C. App. 220, 450 S.E.2d 542 (1994), cert. denied, — N.C. —, 454 S.E.2d 267 (1995).

IV. CONDITIONS PRECEDENT.

Statutes of Repose. — Under North Carolina law statutes of repose are conditions precedent which must be specially pled. Tipton & Young Constr. Co. v. Blue Ridge Structure Co., 116 N.C. App. 115, 446 S.E.2d 603, cert. granted, 338 N.C. 314, 450 S.E.2d 490 (1994).

Rule 10. Form of pleadings.

CASE NOTES

Cited in Pugh v. Pugh, 111 N.C. App. 118, 431 S.E.2d 873 (1993).

Rule 11. Signing and verification of pleadings.

Legal Periodicals. —

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

CASE NOTES

I. In General.

I. IN GENERAL.

In analyzing whether the complaint meets the factual certification requirement, the court must determine: whether the plaintiff (1) undertook a reasonable inquiry into the facts and (2) after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact. McClerin v. R-M Indus., Inc., 118 N.C. App. 640, 456 S.E.2d 352 (1995).

Lack of Verification. — Petition for a contested case hearing, containing signatures of petitioner and his attorney, but which failed to include either an affidavit executed by petitioner or an affidavit executed by his attorney, was timely filed but was not verified under sections (b) and (c) of this rule when it was filed. Gaskill v. State ex rel. Cobey, 109 N.C. App. 656, 428 S.E.2d 474 (1993), pet. disc. rev. denied, 334 N.C. 163, 432 S.E.2d 359 (1993).

Sanction Provision Not Applicable to Claims Filed Before Amendment of This Rule. —

Although plaintiffs and their attorney could be liable for sanctions under this Rule for signing and filing certain "other papers" for an improper purpose after January 1, 1987, the complaint in the case at bar was filed in December of 1986, and therefore could not be a basis for the imposition of sanctions. Brooks v. Giesey, 334 N.C. 303, 432 S.E.2d 339 (1993).

Dismissal does not deprive the court of jurisdiction to consider collateral issues such as sanctions that require consideration after the action has been terminated. Bryson v. Sullivan, 330 N.C. 644, 412 S.E.2d 327 (1992).

Neither the dismissal of a case nor the filing of an appeal deprives the trial court of jurisdiction to hear Rule 11 motions. Dodd v. Steele, 114 N.C. App. 632, 442 S.E.2d 363, cert. denied, 337 N.C. 691, 448 S.E.2d 521 (1994).

When Sanctions May Be Imposed. — To impose sanctions against a party for filing a complaint for an improper purpose, the complaint must fail either the legal or factual certification requirements of this rule. In re Finnican, 104 N.C. App. 157, 408 S.E.2d 742 (1991), cert. denied, 330 N.C. 612, 413 S.E.2d 800 (1992).

Sanctions Where Party Knew Pleadings Not Factually Plausible. — Where judge announced the rendering of an absolute divorce in open court while defendant was present with counsel, when defendant's motion to dismiss based on lack of service was later filed defendant knew that the pleading was not factually plausible because he had made a general appearance; therefore, the trial court's imposition of sanctions under this rule was proper. Bumgardner v. Bumgardner, 113 N.C. App. 314, 438 S.E.2d 471 (1994).

The Improper Purpose Prong. — The improper purpose prong of this Rule is separate and distinct from the factual and legal sufficiency requirements. Certification under the rule includes three things: That the subject person has read the document, that he or she believes it to be well-grounded in fact and law, and that it is not interposed for any improper purpose. Bryson v. Sullivan, 330 N.C. 644, 412 S.E.2d 327 (1992).

Even if the complaint is well grounded in fact and in law, it may nonetheless violate the improper purpose prong of this rule. McClerin v. R-M Indus., Inc., 118 N.C. App. 640, 456 S.E.2d 352 (1995).

A claim, while well grounded in law, can nevertheless violate the improper purpose prong of this Rule. Taylor v. Taylor Prods. Inc., 105 N.C. App. 620, 414 S.E.2d 568 (1992), overruled on other grounds, 334 N.C. 303, 432 S.E.2d 347 (1993).

While attorney's filing of the notice of lien against former client after having withdrawn from the case violated the legal sufficiency prong of this rule, that itself did not support a strong inference of improper purpose. However, the totality of the circumstances did. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Trial court's decision to impose or not to impose, etc. —

In accord with the main volume. See Williams v. Garrison, 105 N.C. App. 79, 411 S.E.2d 633 (1992).

Inference of Improper Purpose Inferred from Objective Behavior. — Under this rule, an objective standard is used to determine whether a paper has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose. In this regard, the relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Reasonableness of Belief That Claim Is Warranted. — The reasonableness of the belief that a complaint is warranted by existing law must be judged as of the time the document was signed. Taylor v. Taylor Prods. Inc., 105 N.C. App. 620, 414 S.E.2d 568 (1992), overruled on other grounds, 334 N.C. 303, 432 S.E.2d 347 (1993).

Motion for Attorney's Fees. — Petitioner's motion for attorney's fees, filed well before final judgment, was timely; therefore, the trial court had jurisdiction to hear the matter. Whiteco Indus., Inc. v. Harrelson, 111 N.C. App. 815, 434 S.E.2d 229 (1993); Whiteco Indus., Inc. v. Harrington, 111 N.C. App. 839, 434 S.E.2d 234 (1993), cert. granted, 335 N.C. 565, 441 S.E.2d 135 (1994).

Sanctions Not Merited. — Where there was no indication at trial that the grandparents in fact did not wish to obtain custody of the children or that their claim was made in bad faith, the fact that the grandparents had originally asked for visitation does not make their later claim for custody violative of this rule. Kerns v. Southern, 100 N.C. App. 664, 397 S.E.2d 651 (1990).

Although claimant was explicitly told by an employee of the Employment Security Commission that she was not required to conduct a job search during her temporary recall, because there were grounds for the Commission's holding, under § 96-18(g)(2), that claimant repay the sum, received as benefits, based on failure to conduct a job search, sanctions could not be imposed. Gilliam v. Employment Sec. Comm'n, 110 N.C. App. 796, 431 S.E.2d 772, cert. denied and appeal dismissed, 334 N.C. 619, 435 S.E.2d 334 (1993).

Attorney made a "reasonable inquiry" into the factual bases for the allegations contained in the complaint regarding conspiracy, an auto theft-drug ring, and intentional infliction of emotional distress; therefore, the sanctions imposed against attorney were not warranted. Pugh v. Pugh, 111 N.C. App. 118, 431 S.E.2d 873, aff'd, 113 N.C. App. 375, 438 S.E.2d 214 (1994).

Imposition of Sanctions Upheld. — Striking of the notice of the taking of a deposition and prohibiting its further use was a reasonable sanction for a deposition procured in violation of deposition rules, even though it was defendant's counsel, and not defendant itself, who committed the acts giving rise to the sanction. Turner v. Duke Univ., 101 N.C. App. 276, 399 S.E.2d 402, cert. denied, 329 N.C. 504, 407 S.E.2d 552 (1991).

Insured and insured's attorney were properly assessed costs and expenses incurred by holder of security interest in insured's vehicle for improperly naming holder as a party in an action against vehicle's insurer, despite plaintiff's contention that holder was named in pleadings to give it notice as a lienholder. Lassiter v. North Carolina Farm Bureau Mut. Ins. Co., 106 N.C. App. 66, 415 S.E.2d 212, cert. denied, 332 N.C. 148, 419 S.E.2d 573 (1992).

A superior court award of $2,918.82 to reimburse plaintiff for attorneys' fees and expenses and an order to defendant to pay $1,000 to the clerk of superior court as an additional sanction for filing frivolous and vexatious motions to dismiss and for summary judgment was not an abuse of discretion where defendant persisted in advancing arguments which had been previously rejected by the courts. Lowder v. All Star Mills, Inc., 103 N.C. App. 500, 405 S.E.2d 774, cert. denied, 330 N.C. 196, 412 S.E.2d 678 (1991), 332 N.C. 484, 421 S.E.2d 349 (1992).

Where a motion to dismiss and a motion for summary judgment were based on the same grounds that had proven baseless in past motions and appeals, and were patently frivolous, the trial judge had more than ample basis for imposition of sanctions. Lowder v. All Star Mills, Inc., 103 N.C. App. 500, 405 S.E.2d 774, cert. denied, 330 N.C. 196, 412 S.E.2d 678 (1991), 332 N.C. 484, 421 S.E.2d 349 (1992).

Co-counsel for corporate defendant, almost 19 months after corporation employees' counsel gave notice that she was serving as co-counsel, and only two weeks before trial, signed and filed a motion for disqualification of counsel; neither his co-counsel nor his client signed it, and there was no evidence that co-counsel even knew that the motion was being filed, the late date on which the motion was filed indicated an attempt to interrupt opposing counsel's trial preparation and increase litigation costs. Therefore, Rule 11 sanctions were appropriate. Harrison v. Edison Bros. Apparel Stores, 146 F.R.D. 142 (M.D.N.C. 1993).

There was no abuse of discretion in the court's imposition of $931 in sanctions; the court found as a fact that defendant incurred $931.00 as a necessary consequence of plaintiff's notice of appeal following a voluntary dismissal and that the rate was reasonable. Dodd v. Steele, 114 N.C. App. 632, 442 S.E.2d 363, cert. denied, 337 N.C. 691, 448 S.E.2d 521 (1994).

Where the Employment Commission's signing of order remanding the matter to a hearing officer just three days prior to the date by which the Commission was to have entered a final order could be calculated as an attempt to delay the litigation or increase its cost, sanctions would apply. Gilliam v. Employment Sec. Comm'n, 110 N.C. App. 796, 431 S.E.2d 772, cert. denied and appeal dismissed, 334 N.C. 619, 435 S.E.2d 334 (1993).

Where ex-husband filed a complaint to harass ex-wife and needlessly increase the costs of litigation, where senseless litigation initiated by ex-husband had persisted since the parties' separation in 1986, while ex-husband claimed the litigation was part and parcel of his attempts to increase visitation privileges with his son, but he had done nothing constructive to further that objective, and testimony indicated that he has spent $20,000 trying to recover $10,000 in attorney's fees, the trial did not err in imposing $15,000 sanction against the ex-husband. Brown v. Brown, 112 N.C. App. 614, 436 S.E.2d 404 (1993).

Harassment of Former Client. — In light of the obviously strained relationship between former attorney and client, and because it is utterly unreasonable for an attorney, particularly one who has withdrawn from the case, to file an attorney's charging lien seeking recovery of fees based on both quantum meruit and a percentage of the judgment, there exists a strong inference of improper purpose, i.e., harassment, in filing the notice of lien. Accordingly, the trial court's imposition of Rule 11 sanctions based on alleged improper purpose in filing the notice of lien must be upheld. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Subjective Beliefs and Actual Effect of Conduct Not Relevant. — Just as the Rule 11 movant's subjective belief that a paper had been filed for an improper purpose was immaterial in determining whether an alleged offender's conduct was sanctionable, whether the conduct did in fact harass was also not relevant to the issue. Rather, the dispositive question was whether the filing of the notice of lien supported a strong inference of improper purpose. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Denial of Sanctions Not Insulation from Future Sanctions. — The denial of sanctions does not insulate a party or an attorney from the future imposition of sanctions under the improper purpose prong of this rule if the litigation is continued after subsequent developments in the case render it meritless. Taylor v. Taylor Prods. Inc., 105 N.C. App. 620, 414 S.E.2d 568 (1992), overruled on other grounds, 334 N.C. 303, 432 S.E.2d 347 (1993).

Features of Certification. — The central feature of this rule is a certification established by the signature of the person signing the pleadings, motions, or other papers. This certification includes: (1) that the signer has conducted a reasonable inquiry into the facts that support the pleading, motion or other paper; (2) that the signer has conducted a reasonable inquiry into the law such that the paper embodies existing legal principles or a good faith argument for the extension, modification, or reversal of existing legal principles; and (3) that the paper is not interposed for any improper purpose. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Under this rule, in addition to certifying that the pleading or paper is well grounded in fact and not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, the signer also certifies that the pleading or paper is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

The signature of an attorney under this rule simply certifies upon reasonable inquiry that the complaint is well grounded in fact and warranted by existing law; this signature does not demonstrate that there is genuine issue of material fact, in light of evidence gathered after the complaint is filed, as to whether a plaintiff would actually have prevailed on the underlying claim. Byrd v. Arrowood, 118 N.C. App. 418, 455 S.E.2d 672 (1995).

Two-Part Analysis. — An award of sanctions under this rule on the ground that a pleading is not warranted by existing law requires a two-part analysis. First, the court must determine whether the pleading, when read in conjunction with the responsive pleadings, is facially plausible. If it is facially plausible, then the inquiry is complete, and sanctions are not proper. If the pleading is not facially plausible, then the second issue is whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by the existing law. dePasquale v. O'Rahilly, 102 N.C. App. 240, 401 S.E.2d 827 (1991).

In determining whether sanctions are warranted under the legal sufficiency prong of the rule, the court must first determine the facial plausibility of the paper. If the paper is facially plausible, then the inquiry is complete, and sanctions are not proper. If the paper is not facially plausible, then the second issue is (1) whether the alleged offender undertook a reasonable inquiry into the law, and (2) whether, based upon the results of the inquiry, formed a reasonable belief that the paper was warranted by existing law, judged as of the time the paper was signed. If the court answers either prong of this second issue negatively, then sanctions under this rule are appropriate. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Three-Part Analysis. — There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose; a violation of any one of these requirements mandates the imposition of sanctions. Dodd v. Steele, 114 N.C. App. 632, 442 S.E.2d 363, cert. denied, 337 N.C. 691, 448 S.E.2d 521 (1994).

Collateral Issues. — Attorneys' fee requests under this rule raise collateral issues which often require consideration by the trial court after the action has been terminated, and a voluntary dismissal under § 1A-1, Rule 41(a) does not deprive the trial court of jurisdiction to determine these collateral issues.

Higgins v. Patton, 102 N.C. App. 301, 401 S.E.2d 854 (1991), overruled on other grounds, Bryson v. Sullivan, 330 N.C. 644, 412 S.E.2d 327 (1992).

Voluntary Dismissal. — Where the plaintiffs filed a voluntary dismissal with prejudice pursuant to § 1A-1, Rule 41(a)(1), the trial court was not deprived of jurisdiction to determine the appropriateness of attorneys' fees under this rule or § 6-21.5. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Considerations for Court. — This rule raises three interconnected interpretive issues for the court: (1) When has sanctionable conduct occurred? (2) Who should be sanctioned, attorney, client, or both? (3) What sanction is appropriate? Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Inadequate Researching and Filing of Pleadings by Attorney. — Prior to imposing sanctions against an attorney under this rule on the ground that the nonmovant's pleadings are not warranted by the existing law, the movant must show that the attorney's conduct in researching and filing the pleadings was not objectively reasonable. dePasquale v. O'Rahilly, 102 N.C. App. 240, 401 S.E.2d 827 (1991).

Failure of Attorney to Confirm Facts. — The attorney should be sanctioned for failure to take minimal steps to confirm the client's facts, when these facts could be verified easily by reference to the public record or to accessible documents. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991).

Sanctions Against Attorney and Client. — Generally, since the lawyer exercises primary control over the litigation, the responsibility for improper purpose violations should rest with the lawyer. However, "the sanction may fall in equal or greater proportion upon the client as well" as this allocation serves punitive and deterrent purposes. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Sanctions Against Client. — Whether the violation of this rule is one of law, fact, or improper purpose, if the prejudice caused by the violation can only be remedied by entry of sanctions against the client, such sanctions are appropriate. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Where a party misleads an attorney as to facts or the purpose of the lawsuit, but the attorney nevertheless had an objectively reasonable basis to sign the papers in question, then sanctions on the party alone are appropriate. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

No Sanctions Against Client. — Clients should not be sanctioned when the attorney fails to ask the right questions to elicit legally relevant facts. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Allocation of Sanctions. — Sanctions should be allocated among the persons responsible for the offending pleading, motion or other paper, based upon their relative culpability. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

De Novo Review of Sanctions. — Court of Appeals exercises de novo review of the question of whether to impose Rule 11 sanctions; if sanctions were warranted, the court must review the actual sanctions imposed under an abuse of discretion standard. Dodd v. Steele, 114 N.C. App. 632, 442 S.E.2d 363, cert. denied, 337 N.C. 691, 448 S.E.2d 521 (1994).

Reliance on Counsel by Nonlawyers as to Issues of Law. — Reliance on counsel by nonlawyers as to issues of law, is relevant, but not conclusive evidence on the issue of "reasonable inquiry." The reasonableness of the reliance would depend upon the surrounding circumstances including the extent of knowledge possessed by the lawyer about the facts of the controversy, the history and duration of the relationship between the attorney and client, and the relative expertise of the attorney relating to the legal issues involved. It is appropriate, however, to consider in evaluating the reasonableness of the inquiry that nonlawyers are not expected to appreciate the nuances of subtle legal issues. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Determining Compliance with Rule. — In determining compliance with this rule, courts should avoid hindsight and resolve all doubts in favor of the signer. Furthermore, whether the certification requirements have been met requires an objective determination. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Signature of Party Unnecessary for Sanctions. — Defendants were entitled to request sanctions against the attorney, as signer of complaint, and against plaintiffs as represented parties, regardless of whether the plaintiffs signed the complaint. Higgins v. Patton, 102 N.C. App. 301, 401 S.E.2d 854 (1991), overruled on other grounds, Bryson v. Sullivan, 330 N.C. 644, 412 S.E.2d 327 (1992).

Burdens of Proof and Persuasion. — When a motion is made for sanctions pursuant to this rule and the nature of the alleged violation is legal, rather than factual, this rule requires a two-part analysis. In such cases, the court should first scrutinize the challenged paper. If, on its face, the paper states a plausible legal theory (either under existing law or a good faith argument for a change in the law), there is no need for further inquiry. Only if the court concludes that the paper is not facially plausible in its legal analysis is there a need for further scrutiny into the actual conduct of the signer in researching or otherwise gathering the law. The movant bears the burden of persuasion on the first prong of the two-part analysis and the burdens of proof and persuasion on the second prong. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, In re J.A., 103 N.C. App. 720, 407 S.E.2d 873 (1991).

Plaintiff's affidavits did not support the court's finding that judgment was entered as a result of mistake, inadvertence or excusable neglect, as the inadvertence, mistake, or neglect that they showed were of a kind that the law does not excuse. All the affidavits showed, when sifted down, was that in signing the court papers which enabled default judgment to be entered plaintiff's treasurer and counsel were unaware that they had sued for future rents — a matter that they could have known through the exercise of due diligence and reasonable care, and that they were required to know by § 1A-1, Rule 11 of our civil procedure rules. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Applied in Lowry v. Lowry, 99 N.C. App. 246, 393 S.E.2d 141 (1990); First Am. Bank v. Carley Capital Group, 99 N.C. App. 667, 394 S.E.2d 237 (1990); Oglesby v. S.E. Nichols, Inc., 101 N.C. App. 676, 401 S.E.2d 92 (1991); Boone Lumber, Inc. v. Sigmon, 103 N.C. App. 798, 407 S.E.2d 291 (1991); Harwell v. Harwell, 106 N.C. App. 389, 416 S.E.2d 595 (1992); Brooks v. Giesey, 106 N.C. App. 586, 418 S.E.2d 236 (1992); Jerry Bayne, Inc. v. Skyland Indus., Inc., 108 N.C. App. 209, 423 S.E.2d 521 (1992); Able Outdoor, Inc. v. Harrelson, 113 N.C. App. 483, 439 S.E.2d 245 (1994).

Quoted in In re Triscari Children, 109 N.C. App. 285, 426 S.E.2d 435 (1993).

Stated in Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992); Williams v. Liggett, 113 N.C. App. 812, 440 S.E.2d 331 (1994).

Cited in McKinney v. Avery Journal, Inc., 99 N.C. App. 529, 393 S.E.2d 295 (1990); Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990); Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991); T.H. Blake Contracting Co. v. Sorrells, 109 N.C. App. 119, 426 S.E.2d 85 (1993); Pearsall v. Phillips, 839 F. Supp. 11 (E.D.N.C. 1993); Logan v. Logan, 116 N.C. App. 344, 447 S.E.2d 485 (1994); Wachovia Bank v. Bob Dunn Jaguar, Inc., 117 N.C. App. 165, 450 S.E.2d 527 (1994).

Rule 12. Defenses and objections; when and how presented; by pleading or motion; motion for judgment on pleading.

Legal Periodicals. —

For article, "Functions of Rule 12(b)(6) in the Federal Rules of Civil Procedure: A Categorization Approach," see 15 Campbell L. Rev. 119 (1993).

CASE NOTES

I. In General.
III. Preservation and Waiver of Defenses, Generally.
IV. Subject Matter Jurisdiction.
V. Personal Jurisdiction.
VII. Insufficiency of Process.
IX. Failure to State Claim.
  A. In General.
  B. Conversion of Motion to Dismiss to Summary Judgment Motion.
XI. Motion for Judgment on the Pleadings.

I. IN GENERAL.

Taken together, subsection (b)(6) of this rule and § 1A-1, Rule 8(a) suggest pleadings should be limited to those facts or descriptions of transactions, occurrences, or series of transactions or occurrences, intended to be proved. Bowlin v. Duke Univ., 108 N.C. App. 145, 423 S.E.2d 320 (1992), cert. denied, 333 N.C. 461, 427 S.E.2d 618 (1993).

An order entered out of session without the parties' consent is null and void and must be vacated pursuant to subsection (h)(3) of this rule. Turner v. Hatchett, 104 N.C. App. 487, 409 S.E.2d 747 (1991).

Subject Matter Jurisdiction of Court. — Superior court could not dismiss complaint with prejudice for failure to state a claim where the court lacked subject matter jurisdiction over plaintiffs' claim. Flowers v. Blackbeard Sailing Club, Ltd., 115 N.C. App. 349, 444 S.E.2d 636, cert. denied, 337 N.C. 691, 448 S.E.2d 522 (1994).

Distinction Between Motion to dismiss and Motion for Summary Judgment. — The distinction between a motion to dismiss under subdivision (b)(6) of this rule and a motion for summary judgment is more than a mere technicality. When considering a motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery. By contrast, when considering a summary judgment motion, the trial court must look at more than the pleadings; it must also consider additional matters such as affidavits, depositions and other specified matter outside the pleadings. Locus v. Fayetteville State Univ., 102 N.C. App. 522, 402 S.E.2d 862 (1991).

Justiciable Controversy. — The mere filing of an affirmative defense, without more, is not sufficient to establish the absence of a justiciable issue, nor is the grant of a motion under subdivision (b)(6) of this rule, nor the entry of summary judgment. These events may only be evidence of the absence of a justiciable issue. However, action by the losing party which perpetuated litigation in the face of events substantially establishing that the pleadings no longer presented a justiciable controversy may also serve as evidence for purposes of § 6-21.5. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Procedure and Discovery in Shareholders' Derivative Actions. — For a case discussing interplay of rules and statutes governing procedure and discovery in shareholders' derivative action, particularly with respect to former § 55-55(c) (see now § 55-7-40(d)), this rule, and § 1A-1, Rules 23 and 56, see Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Applied in George Shinn Sports, Inc. v. Bahakel Sports, Inc., 99 N.C. App. 481, 393 S.E.2d 580 (1990); Hare v. Butler, 99 N.C. App. 693, 394 S.E.2d 231 (1990); Pinehurst Area Realty, Inc. v. Village of Pinehurst, 100 N.C. App. 77, 394 S.E.2d 251 (1990), review denied and appeal dismissed, 328 N.C. 92, 402 S.E.2d 417 (1991); Lexington Aerolina, Inc. v. Murray Aviation, Inc., 100 N.C. App. 254, 394 S.E.2d 838 (1990); Harris-Teeter Super Mkts, Inc. v. Watts, 98 N.C. App. 684, 392 S.E.2d 123 (1990); Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990); Rabon v. Rabon, 102 N.C. App. 452, 402 S.E.2d 461 (1991); Warzynski v. Empire Comfort Sys., 102 N.C. App. 222, 401 S.E.2d 801 (1991); Estridge v. Ford Motor Co., 101 N.C. App. 716, 401 S.E.2d 85 (1991); Lynn v. Overlook Dev., 328 N.C. 689, 403 S.E.2d 469 (1991); Amos v. Oakdale Knitting Co., 102 N.C. App. 782, 403 S.E.2d 565 (1991); Coleman v. Cooper, 102 N.C. App. 650, 403 S.E.2d 577 (1991); Caldwell v. Caldwell, 103 N.C. App. 380, 405 S.E.2d 588 (1991); Doe ex rel. Connolly v. Holt, 103 N.C. App. 516, 405 S.E.2d 807 (1991); Hull v. Oldham, 104 N.C. App. 29, 407 S.E.2d 611 (1991); Coastal Leasing Corp. v. O'Neal, 103 N.C. App. 230, 405 S.E.2d 208 (1991); Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991); Williams v. New Hanover County Bd. of Educ., 104 N.C. App. 425, 409 S.E.2d 753 (1991); Moore v. Wykle, 107 N.C. App. 120, 419 S.E.2d 164 (1992); Venable v. GKN Automotive, 107 N.C. App. 579, 421 S.E.2d 378 (1992); Sorrells v. M.Y.B. Hospitality Ventures, 332 N.C. 645, 423 S.E.2d 72 (1992); Monti ex rel. United States v. United Servs. Auto. Ass'n, 108 N.C. App. 342, 423 S.E.2d 530 (1992); White v. Williams, 111 N.C. App. 879, 433 S.E.2d 808 (1993); Reid v. Roberts, 112 N.C. App. 222, 435 S.E.2d 116 (1993); Poston v. Poston, 112 N.C. App. 849, 436 S.E.2d 854 (1993); Brantley v. Watson, 113 N.C. App. 234, 438 S.E.2d 211 (1994); O'Donnell v. City of Asheville, 113 N.C. App. 178, 438 S.E.2d 422 (1994); Bumgardner v. Bumgardner, 113 N.C. App. 314, 438 S.E.2d 471 (1994); Jenkins v. Wilson, 113 N.C. App. 557, 439 S.E.2d 244 (1994); Floraday v. Don Galloway Homes, Inc., 114 N.C. App. 214, 441 S.E.2d 610 (1994); Gunter v. Anders, 115 N.C. App. 331, 444 S.E.2d 685 (1994), cert. denied, — N.C. —, 454 S.E.2d 250, cert. dismissed, 339 N.C. 612, 454 S.E.2d 651 (1995); Winters v. Lee, 115 N.C. App. 692, 446 S.E.2d 123 (1994); Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994), cert. denied, 339 N.C. 736, 454 S.E.2d 647 (1995); Gregory v. City of Kings Mt., 117 N.C. App. 99, 450 S.E.2d 349 (1994); State ex rel. Cobey v. Cook, 118 N.C. App. 70, 453 S.E.2d 553 (1995); Leach v. Monumental Life Ins. Co., 118 N.C. App. 434, 455 S.E.2d 450 (1995).

Stated in Haas v. Caldwell Sys., 98 N.C. App. 679, 392 S.E.2d 110 (1990); Embree Constr. Group, Inc. v. Rafcor, Inc., 330 N.C. 487, 411 S.E.2d 916 (1992); Adams Outdoor Adv. v. North Carolina DOT, 112 N.C. App. 120, 434 S.E.2d 666 (1993).

Cited in May v. Martin, 99 N.C. App. 216, 392 S.E.2d 414 (1990); Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990); Snow v. Yates, 99 N.C. App. 317, 392 S.E.2d 767 (1990); Schall v. Jennings, 99 N.C. App. 343, 393 S.E.2d 130 (1990); Medley v. North Carolina Dep't of Cor., 99 N.C. App. 296, 393 S.E.2d 288 (1990); Carolina-Atlantic Distribs., Inc. v. Boyce Insulation Co., 99 N.C. App. 577, 393 S.E.2d 337 (1990); Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990); Stallings v. Gunter, 99 N.C. App. 710, 394 S.E.2d 212 (1990); First Am. Bank v. Carley Capital Group, 99 N.C. App. 667, 394 S.E.2d 237 (1990); Beatty v. Charlotte-Mecklenburg Bd. of Educ., 99 N.C. App. 753, 394 S.E.2d 242 (1990); Hill v. Winn-Dixie Charlotte, Inc., 100 N.C. App. 518, 397 S.E.2d 347 (1990); McCollum v. McCollum, 102 N.C. App. 347, 401 S.E.2d 773 (1991); Fox v. Killian, 102 N.C. App. 819, 403 S.E.2d 546 (1991); Hart v. Ivey, 102 N.C. App. 583, 403 S.E.2d 914 (1991); Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921 (1991); Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991); North Carolina R.R. v. Ferguson Bldrs. Supply, 103 N.C. App. 768, 407 S.E.2d 296 (1991); Shingledecker v. Shingledecker, 103 N.C. App. 783, 407 S.E.2d 589 (1991); Ray v. Ray, 103 N.C. App. 790, 407 S.E.2d 592 (1991); Ferrell v. DOT, 104 N.C. App. 42, 407 S.E.2d 601 (1991); Brickhouse v. Brickhouse, 104 N.C. App. 69, 407 S.E.2d 607 (1991); Hall v. Simmons, 329 N.C. 779, 407 S.E.2d 816 (1991); Daniels v. Hertz Corp., 104 N.C. App. 700, 411 S.E.2d 394 (1991); Salt v. Applied Analytical, Inc., 104 N.C. App. 652, 412 S.E.2d 97 (1991); Ballance v. Rinehart, 105 N.C. App. 203, 412 S.E.2d 106 (1992); Taylor v. Taylor Prods. Inc., 105 N.C. App. 620, 414 S.E.2d 568 (1992); Perkins v. CCH Computax, Inc., 106 N.C. App. 210, 415 S.E.2d 755 (1992); Gardner v. Gardner, 106 N.C. App. 635, 418 S.E.2d 260 (1992); Lenzer v. Flaherty, 106 N.C. App. 496, 418 S.E.2d 276 (1992); Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992); Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487 (1992); State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374 (1992); Tutterrow v. Leach, 107 N.C. App. 703, 421 S.E.2d 816 (1992); Nationwide Mut. Ins. Co. v. Silverman ex rel. Radja, 332 N.C. 633, 423 S.E.2d 68 (1992); Perkins v. CCH Computax, Inc., 333 N.C. 140, 423 S.E.2d 780 (1992); Pendergrass v. Card Care, Inc., 333 N.C. 233, 424 S.E.2d 391 (1993); Sorrells v. M.Y.B. Hospitality Ventures, 108 N.C. App. 668, 424 S.E.2d 676 (1993); Pieper v. Pieper, 108 N.C. App. 722, 425 S.E.2d 435 (1993); Winter v. Williams, 108 N.C. App. 739, 425 S.E.2d 458 (1993); Lindler v. Duplin County Bd. of Educ., 108 N.C. App. 757, 425 S.E.2d 465 (1993); Richmond County v. North Carolina Low-level Radioactive Waste Mgt. Auth., 108 N.C. App. 700, 425 S.E.2d 468 (1993); Munie v. Tangle Oaks Corp., 109 N.C. App. 336, 427 S.E.2d 149 (1993); Capital Outdoor Adv., Inc. v. City of Raleigh, 109 N.C. App. 399, 427 S.E.2d 154 (1993); Little v. Bennington, 109 N.C. App. 482, 427 S.E.2d 887 (1993); Bockweg v. Anderson, 333 N.C. 486, 428 S.E.2d 157 (1993); Gravitte v. Mitsubishi Semiconductor Am., Inc., 109 N.C. App. 466, 428 S.E.2d 254 (1993); Andrews v. Elliot, 109 N.C. App. 271, 426 S.E.2d 430 (1993); Gaskill v. State ex rel. Cobey, 109 N.C. App. 656, 428 S.E.2d 474 (1993); Woodard v. North Carolina Local Governmental Employees' Retirement Sys., 110 N.C. App. 83, 428 S.E.2d 849 (1993); Cherry v. Harris, 110 N.C. App. 478, 429 S.E.2d 771 (1993); Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993); Kuder v. Schroeder, 110 N.C. App. 355, 430 S.E.2d 271 (1993); Prevette v. Forsyth County, 110 N.C. App. 754, 431 S.E.2d 216 (1993); Hargett v. Holland, 111 N.C. App. 200, 431 S.E.2d 784 (1993); Considine v. West Point Dairy Prods., 111 N.C. App. 427, 432 S.E.2d 412 (1993); Bardolph v. Arnold, 112 N.C. App. 190, 435 S.E.2d 109 (1993); Sorrells v. M.Y.B. Hospitality Ventures, 334 N.C. 669, 435 S.E.2d 320 (1993); Keys v. Duke Univ., 112 N.C. App. 518, 435 S.E.2d 820 (1993); Richmond County v. North Carolina Low-Level Radioactive Waste Mgt. Auth., 335 N.C. 77, 436 S.E.2d 113 (1993); Abels v. Renfro Corp., 335 N.C. 209, 436 S.E.2d 822 (1993); Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 112 N.C. App. 828, 436 S.E.2d 869 (1993); Cohn v. Wilkes Regional Medical Ctr., 113 N.C. App. 275, 437 S.E.2d 889, cert. denied, 336 N.C. 603, 447 S.E.2d 387 (1994); Conklin v. Carolina Narrow Fabrics Co., 113 N.C. App. 542, 439 S.E.2d 239 (1994); Smith v. Smith, 113 N.C. App. 410, 438 S.E.2d 457 (1994); Naegele Outdoor Adv., Inc. v. City of Winston-Salem, 113 N.C. App. 758, 440 S.E.2d 842 (1994); Donovan v. Fiumara, 114 N.C. App. 524, 442 S.E.2d 572 (1994); City of Raleigh v. Hudson Belk Co., 114 N.C. App. 815, 443 S.E.2d 112 (1994); Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994); Cage v. Colonial Bldg. Co., 337 N.C. 682, 448 S.E.2d 115 (1994); Smith v. Bumgarner, 115 N.C. App. 149, 443 S.E.2d 744 (1994); Dublin v. UCR, Inc., 115 N.C. App. 209, 444 S.E.2d 455, appeal dismissed and cert. denied, — N.C. —, 449 S.E.2d 569 (1994); Howard v. Travelers Ins. Co., 115 N.C. App. 458, 445 S.E.2d 66 (1994); Leeuwenburg v. Waterway Inv. Ltd. Partnership, 115 N.C. App. 541, 445 S.E.2d 614 (1994); McCorkle v. Aeroglide Corp., 115 N.C. App. 651, 446 S.E.2d 145 (1994); Diggs v. Diggs, 116 N.C. App. 95, 446 S.E.2d 873, cert. denied, 338 N.C. 515, 452 S.E.2d 809 (1994); Smith v. Nationwide Mut. Fire Ins. Co., 116 N.C. App. 134, 446 S.E.2d 877 (1994); Bryant v. North Carolina State Bd. of Exmrs. of Elec. Contractors, 338 N.C. 288, 449 S.E.2d 188 (1994); Peace River Elec. Coop. v. Ward Transformer Co., 116 N.C. App. 493, 449 S.E.2d 202 (1994), cert. denied, 339 N.C. 739, 454 S.E.2d 655 (1995); Jones v. Summers, 117 N.C. App. 415, 450 S.E.2d 920 (1994); Regan v. Amerimark Bldg. Prods., Inc., 118 N.C. App. 328, 454 S.E.2d 849 (1995); Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473 (1995); Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995); Nationwide Mut. Ins. Co. v. Davis, 118 N.C. App. 494, 455 S.E.2d 892 (1995); Adams v. Cooper, 340 N.C. 242, 456 S.E.2d 514 (1995).

III. PRESERVATION AND WAIVER OF DEFENSES, GENERALLY.

Waiver of Venue in Custody and Support Modification Proceeding. — Waiver of venue occurs when a custody and support modification request is filed with the district court in an improper county and there is no timely demand that the trial be conducted in the proper county. In such event, the district court in the improper county appropriately adjudicates the modification request. Brooks v. Brooks, 107 N.C. App. 44, 418 S.E.2d 534 (1992).

IV. SUBJECT MATTER JURISDICTION.

And a motion to dismiss for lack of subject matter jurisdiction is not viewed in the same manner, etc. — Failure to properly file a petition for writ of certiorari with the superior court which would have allowed the court to exercise its jurisdiction following administrative hearing justified dismissal by the trial court. House of Raeford Farms, Inc. v. City of Raeford, 104 N.C. App. 280, 408 S.E.2d 885 (1991).

Failure to Comply with Requirements of § 1A-1, Rule 23(b) Not Jurisdictional Defect. — Although complaint, in shareholders' derivative suit was not properly verified, because § 1A-1, Rule 23(b) addresses the procedure to be followed in, and not the substantive elements of, a shareholders' derivative suit, plaintiffs' failure to comply with the verification requirement at the time the complaint was filed was not a jurisdictional defect. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

V. PERSONAL JURISDICTION.

Motion to Dismiss for Lack of Personal Jurisdiction. — Motion to dismiss should have been granted to defendant, where court lacked authority to exercise personal jurisdiction over it. Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148, 437 S.E.2d 699 (1993).

A general appearance will waive the right to challenge personal jurisdiction, etc. —

A general appearance by a party's attorney will dispense with process and service on the defendant; and, the filing of an answer by the defendant's attorney, which does not include the defense of lack of personal jurisdiction, constitutes a waiver of this defense if the defense has not been raised in a prior motion. Grimsley v. Nelson, 117 N.C. App. 329, 451 S.E.2d 336 (1994), cert. granted, 340 N.C. 111, 455 S.E.2d 661 (1995).

General Appearance Not Shown. — Because the filing of the answer was entirely consistent with this section and because the record revealed that the plaintiffs were fully aware of the fact that the attorney signing the answer represented the insurance company, there arises no presumption that the attorney represented the defendant. Accordingly, the answer did not constitute a general appearance by the defendant, and the defendant was not precluded from later raising the defense of lack of personal jurisdiction. Grimsley v. Nelson, 117 N.C. App. 329, 451 S.E.2d 336 (1994), cert. granted, 340 N.C. 111, 455 S.E.2d 661 (1995).

VII. INSUFFICIENCY OF PROCESS.

Correctable Error. — Trial court erred in granting defendants' motion to dismiss pursuant to subdivisions (b)(4) and (5) as the designation of the incorrect county on the civil summons form was not a jurisdictional defect but rather an irregularity or error in form correctable by amending the summons in accordance with Rule 4(i). Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995).

IX. FAILURE TO STATE CLAIM.

A. In General.

Constitutional Issues. — To test the legal sufficiency of a complaint asserting constitutional issues, a party may move to dismiss under this rule. North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990), cert. denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

Allegations Treated as True. —

Where case was dismissed prior to trial pursuant to subdivision (b)(6), it is clear under North Carolina law that the court must treat the allegations of the complaint as true. Hickman ex rel. Womble v. McKoin, 337 N.C. 460, 446 S.E.2d 80 (1994).

Complaint Sufficient to Withstand Motion to Dismiss. — Where complaint alleged the existence of an employment contract containing a specific duration of employment, as it is well established that this type of employment contract is not terminable at will, and plaintiff was not permitted to complete the contract's stated duration of employment, the breach of contract claim as alleged in the complaint was sufficient to withstand defendant's subdivision (b)(6) motion to dismiss. Brandis v. Lightmotive Fatman, Inc., 115 N.C. App. 59, 443 S.E.2d 887 (1994).

In a conversion action, owners of leased portable hangers stated claim based on city's taking control of hangers pursuant to a bankruptcy clause in the agreement, even though plaintiff owners ability to recover depended on whether the hangers were in fact "trade fixtures" and thus personalty or improvements affixed to the realty. Garvin v. City of Fayetteville, 102 N.C. App. 121, 401 S.E.2d 133 (1991).

Facts alleging unfair claim settlement practices were sufficient to state a claim for unfair trade practices under § 58-63-15 so as to withstand a challenge under subdivision (b)(6) of this rule. Miller v. Nationwide Mut. Ins. Co., 112 N.C. App. 295, 435 S.E.2d 537 (1993), cert. denied, 335 N.C. 770, 442 S.E.2d 519 (1994).

Allegations in amended complaint were sufficient to state a claim for relief based on a theory of negligence against an aircraft manufacturer in the preparation and publication of the information manual on mechanical functions. Driver v. Burlington Aviation, Inc., 110 N.C. App. 519, 430 S.E.2d 476 (1993).

Or Where Complaint Discloses Unconditional Affirmative Defense. —

Once it is determined that the affirmative defense is properly before the trial court, dismissal under Rule 12(b)(6) on the grounds of the affirmative defense is proper if the complaint on its face reveals an insurmountable bar to recovery. Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Where an affirmative defense is raised for the first time in a motion to dismiss under subsection (b)(6) of this rule, the motion must ordinarily refer expressly to the affirmative defense relied upon. Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Absent a showing of prejudice, an affirmative defense may be raised by a Rule 12(b)(6) motion to dismiss. Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Where the nonmovant has not been surprised and has full opportunity to argue and present evidence on the affirmative defense, the failure of the motion filed under subsection (b)(6) of this rule to expressly refer to the affirmative defense will not bar consideration of the defense by the trial court. Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Appeal of Denial of Motion to Dismiss Heard. — Generally, the denial of a motion under subsection 12(b)(6) of this rule is interlocutory and not immediately appealable. However, where the court of appeals had proper jurisdiction over the other issues and because the parties desired an answer to a question which was fundamental in determining their rights, was also of public importance, and would aid State agencies in the performance of their duties, the court exercised its supervisory discretion to address on the merits the appeal. Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420, cert. denied, 334 N.C. 162, 432 S.E.2d 358, aff'd per curiam, 335 N.C. 158, 436 S.E.2d 821 (1993).

Challenge to Congressional Redistricting Plan. — Action brought by the Republican Party of North Carolina, thirty registered Republicans, nine registered Democrats, and three citizens not affiliated with either party to challenge the State's federal congressional redistricting plan was dismissed with prejudice under Rule 12(b)(6) for failure to state a claim. Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992), aff'd, — U.S. —, 113 S. Ct. 30, 121 L. Ed. 2d 3 (1992).

Failure to Allege Waiver of Immunity. — Where plaintiffs failed to allege in their complaint that defendant school board waived its immunity by the procurement of liability insurance to cover alleged negligence or tort, plaintiffs' complaint failed to state a cause of action as to defendant school board. Gunter v. Anders, 114 N.C. App. 61, 441 S.E.2d 167.

Improper to Consider Statute of Frauds. —

A defendant may not take advantage of the provisions of the statute of frauds by a motion to dismiss for failure to state a claim upon which relief could be granted, which must be pleaded as an affirmative defense. Green v. Harbour, 113 N.C. App. 280, 437 S.E.2d 719 (1993).

A claim should be dismissed under this rule where it appears that plaintiff is entitled to no relief under any statement of facts which could be proven; this will occur when there is a want of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. Garvin v. City of Fayetteville, 102 N.C. App. 121, 401 S.E.2d 133 (1991).

Review of Denial of Motion to Dismiss Not Available After Judgment on Merits. —

An unsuccessful movant under subsection (b)(6) of this rule may not seek review of denial of such motion on appeal from judgment on the merits against him. Berrier v. Thrift, 107 N.C. App. 356, 420 S.E.2d 206 (1992), cert. denied, 333 N.C. 254, 424 S.E.2d 918 (1993).

Claim for Concurrent Negligence. — For case holding plaintiff successfully stated a cause of action for concurrent negligence based upon the negligent acts of multiple defendants even though plaintiff could not allege which defendant had committed the injurious act, see McMillan ex rel. McMillan v. Mahoney, 99 N.C. App. 448, 393 S.E.2d 298 (1990).

Claim Against Parents for Negligence in Giving Air Rifles to Children. — For case holding plaintiff successfully stated a claim for negligence against parents for giving air rifles to their minor children (where plaintiff's injury was sustained after being shot by one of the children), see McMillan ex rel.

McMillan v. Mahoney, 99 N.C. App. 448, 393 S.E.2d 298 (1990).

B. Conversion of Motion to Dismiss to Summary Judgment Motion.

When Motion to Dismiss Converted, etc. —
In accord with sixth paragraph in main volume. See King v. Durham County Mental Health Developmental Disabilities & Substance Abuse Auth., 113 N.C. App. 341, 439 S.E.2d 771 (1994).

XI. MOTION FOR JUDGMENT ON THE PLEADINGS.

Inapplicable to Post-Trial Motions. — Motions under section (c) of this rule are pretrial motions requiring a review of the pleadings; they cannot be employed to test the validity of post-trial motions. Scott v. Scott, 106 N.C. App. 379, 416 S.E.2d 583 (1992).

Movant Must Prove Entitlement, etc. —
In accord with third paragraph of the main volume. See Whitaker v. Clark, 109 N.C. App. 379, 427 S.E.2d 142 (1993), cert. denied, 333 N.C. 795, 431 S.E.2d 31 (1993).

Motion for Judgment on the Pleadings Treated as (12)(b)(6) Motion. — Although respondent styled his motion as one for judgment on the pleadings pursuant to Rule 12(c), the court treated it as a motion for failure to state a claim because (1) the basis for the motion was that the petition failed to state sufficient facts as required by § 7A-289.25(6), and (2) a motion is treated according to its substance and not its label. In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158, appeal dismissed, 332 N.C. 483, 424 S.E.2d 397 (1992).

Refusal to Grant Judgment on Pleadings on Grounds of Governmental Immunity. — Although normally an appeal does not lie from the denial of a motion for judgment on the pleadings, an immediate appeal will lie under subsection (c), as well as subsection (b), where the trial court refuses to grant a judgment on the pleadings for the state on the grounds of governmental immunity. Whitaker v. Clark, 109 N.C. App. 379, 427 S.E.2d 142 (1993), cert. denied, 333 N.C. 795, 431 S.E.2d 31 (1993).

Summary judgment improper where plaintiffs' claim raised a genuine issue as to defendant's negligence in the design and construction of a retaining wall, the necessary costs to remedy the defects and the appropriate damages by submitting affidavits and photographs in support of their claim, and defendant submitted no material beyond its pleadings. Floraday v. Don Galloway Homes, Inc., 340 N.C. 223, 456 S.E.2d 303 (1995).

Rule 13. Counterclaim and crosscla
im.

CASE NOTES

I. In General.
II. Counterclaims.
III. Crossclaims.

I. IN GENERAL.

Applied in United States Fire Ins. Co. v. Southeast Airmotive Corp., 102 N.C. App. 470, 402 S.E.2d 466 (1991); North Carolina Farm Bureau Mut. Ins. Co. v. Wingler, 110 N.C. App. 397, 429 S.E.2d 759 (1993).

Cited in Curtis v. Curtis, 104 N.C. App. 625, 410 S.E.2d 917 (1991); Post & Front Properties, Ltd. v. Roanoke Constr. Co., 117 N.C. App. 93, 449 S.E.2d 765 (1994).

II. COUNTERCLAIMS.

What Claims Must Be Asserted. — This rule requires a party to assert as a counterclaim any claim arising out of the same transaction or occurrence as the pending action, "at peril of being barred" from asserting the claim in a later action. Furr v. Noland, 103 N.C. App. 279, 404 S.E.2d 885 (1991).

Where plaintiff proffered its counterclaims one year and three months after the filing of the complaint, by that time and, for the first time, be exposed to treble damages because plaintiff was initially acting pro se and its first attorney was dilatory. House Healers Restorations, Inc. v. Ball, 112 N.C. App. 783, 437 S.E.2d 383 (1993).

Counterclaims were compulsory where they arose out of business dealings of the parties covering over a two-year period and the expenditure of over one million dollars, and where defendants conceded that the counterclaims were compulsory in their brief by stating that they "arise out of the same series of transactions as the claims in the original complaints," and that "a reasonable person would have brought all of the claims on the original complaints." House Healers Restorations, Inc. v. Ball, 112 N.C. App. 783, 437 S.E.2d 383 (1993).

Voluntary Dismissal of Compulsory Counterclaim as Bar to Later Suit. — Plaintiff may not maintain action on a claim which was a compulsory counterclaim in a prior lawsuit and on which plaintiff took a voluntary dismissal. Furr v. Noland, 103 N.C. App. 279, 404 S.E.2d 885 (1991).

This rule and the doctrine of res judicata would be completely undermined if parties were allowed to voluntarily dismiss and then later re-file compulsory counterclaims. The judicial economy promoted by this rule would be lost. Furr v. Noland, 103 N.C. App. 279, 404 S.E.2d 885 (1991).

III. CROSSCLAIMS.

Class Action Crossclaim. — The class of plaintiffs was entitled as a matter of law to proceed against impleaded defendant because plaintiffs' crossclaim related to the subject matter of the action and because the crossclaim merely realleged claims which the court found to be appropriate for class action procedure. Dublin v. UCR, Inc., 115 N.C. App. 209, 444 S.E.2d 455, appeal dismissed and cert. denied, — N.C. —, 449 S.E.2d 569 (1994).

Rule 14. Third-party practice.

CASE NOTES

Dismissal of Third-Party Complaint. — In divorce action where husband filed an answer in which he asserted a counterclaim against wife and a third-party complaint against third-party defendant bank and where he alleged that wife fraudulently obtained an equity line of credit from the bank, secured by a deed of trust on the marital home, without his knowledge and consent and through his forged signature which was purportedly "witnessed" by bank employees, the court did not err in dismissing the third-party complaint; wife's claims against husband were for an absolute divorce and for an equitable distribution of the marital property, and the bank could not be held liable to husband should an absolute divorce be granted; if the transaction resulting in the deed of trust is found to have been entered into without husband's consent and knowledge, the debts secured by the deed of trust would be held to be separate to wife; any misconduct by wife affecting the value of the property would also be considered in distributing the property. McCollum v. McCollum, 102 N.C. App. 347, 401 S.E.2d 773 (1991).

Cited in Haas v. Caldwell Sys., 98 N.C. App. 679, 392 S.E.2d 110 (1990); Dick Parker Ford, Inc. v. Bradshaw, 102 N.C. App. 529, 402 S.E.2d 878 (1991).

Rule 15. Amended and supplemental pleadings.

CASE NOTES

I. In General.
II. Amendments to Conform to Evidence.
III. Relation Back of Amendments.
IV. Supplemental Pleadings.

I. IN GENERAL.

As a general rule, once judgment is entered, amendment of the complaint is not allowed unless the judgment is set aside or vacated under § 1A-1, Rule 59 or § 1A-1, Rule 60. Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 398 S.E.2d 628 (1990), discretionary review denied, 328 N.C. 570, 403 S.E.2d 509 (1991).

Plaintiffs Should Have Sought Leave to Amend Although Claim Raised in Answer. — Where the essence of plaintiffs' complaint and amended complaint was that defendants made unauthorized and unwarranted diversions of school bond proceeds to purposes other than those authorized by the bond resolution, namely for purchase and renovation of the Square D facility, and where neither complaint included an allegation that monies from other sources of revenue were improperly diverted, although defense, asserted in the answer of the Board of Education defendants, raised a claim of misappropriation of revenues other than bond proceeds, the trial court did not err in limiting denial of defendants' motions to dismiss to only the allegations relating to the propriety of the expenditure of school bond proceeds on the Square D facility; if plaintiffs desired to add a claim that defendants diverted sources of revenue other than school bond proceeds, plaintiffs should have sought leave to amend under this rule. Moore v. Wykle, 107 N.C. App. 120, 419 S.E.2d 164, cert. denied, 332 N.C. 666, 424 S.E.2d 405 (1992).

Six Months Delay Too Long to Amend Name. — When, after being informed by named defendant that they were not the proper defendant, plaintiffs waited over six months to file amended complaint, defendant properly asserted the statute of limitations as a bar to plaintiffs' effort to correct the name of the party already in court. Franklin v. Winn Dixie Raleigh, Inc., 117 N.C. App. 28, 450 S.E.2d 24 (1994).

Failure to Make Motion in Timely Fashion. — Trial court did not err in denying plaintiffs' motion to amend their complaint where plaintiffs knew of the purchase of insurance for nearly two and a half years, and failed to amend their complaint to allege this until the motions hearing when defendants moved to dismiss the action based on plaintiffs' failure to so plead. Gunter v. Anders, 115 N.C. App. 331, 444 S.E.2d 685 (1994), cert. denied, — N.C. —, 454 S.E.2d 250, cert. dismissed, 339 N.C. 612, 454 S.E.2d 651 (1995).

Amendment to Add Defense. — Trial court did not err by allowing defendants to amend their respective answers to add defense that renewal insurance policy gave insufficient notice. North River Ins. Co. v. Young, 117 N.C. App. 663, 453 S.E.2d 205 (1995).

Burden of Party Objecting to Amendment. — The party objecting to the amendment has the burden of establishing it will be materially prejudiced by the amendment. North River Ins. Co. v. Young, 117 N.C. App. 663, 453 S.E.2d 205 (1995).

Discretion of Court. — Whether a motion to amend a pleading is allowed or denied is addressed to the sound discretion of the court and is accorded great deference. North River Ins. Co. v. Young, 117 N.C. App. 663, 453 S.E.2d 205 (1995).

Trial court's denial of plaintiff's motion to amend upheld. House of Raeford Farms, Inc. v. City of Raeford, 104 N.C. App. 280, 408 S.E.2d 885 (1991).

Denial of Defendants' Motion to Amend Answer. — Where defendants moved to amend their answer almost a full year from filing it and after both parties had conducted extensive discovery, and where, if the trial court had allowed amendment, plaintiffs would have been required to produce evidence of party's negligence approximately five years after the accident, at least on grounds of defendants' undue delay and undue prejudice to plaintiffs, the trial court was justified in denying defendants' motion to amend their answer. Patrick v. Ronald Williams, Professional Ass'n, 102 N.C. App. 355, 402 S.E.2d 452 (1991).

The trial court did not err by denying the plaintiffs' motion, etc. — Where motion to amend was filed over a year after the original complaint, and the requested amendment purported to add a seventh cause of action, but the cause of action was ambiguous and no relief was requested, the trial court did not abuse its discretion in denying the motion to amend the complaint. Outer Banks Contractors v. Daniels & Daniels Constr., Inc., 111 N.C. App. 725, 433 S.E.2d 759 (1993).

Where insufficient evidence existed to support defendant's claim, allowing defendant to amend its pleadings to include such a claim would be futile, the trial court did not err in denying defendant's motion to amend. IRT Property Co. v. Papagayo, Inc., 112 N.C. App. 318, 435 S.E.2d 565 (1993), rev'd on other grounds, 338 N.C. 293, 449 S.E.2d 459 (1994).

Applied in County of Rutherford ex rel. Child Support Enforcement Agency ex rel. Hedrick v. Whitener, 100 N.C. App. 70, 394 S.E.2d 263 (1990); Marina Food Assocs. v. Marina Restaurant, Inc., 100 N.C. App. 82, 394 S.E.2d 824 (1990); News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992); Borg-Warner Acceptance Corp. v. Johnston, 107 N.C. App. 174, 419 S.E.2d 195 (1992); Munie v. Tangle Oaks Corp., 109 N.C. App. 336, 427 S.E.2d 149 (1993); Holloway v. Wachovia Bank & Trust Co., 109 N.C. App. 403, 428 S.E.2d 453 (1993); Freese v. Smith, 110 N.C. App. 28, 428 S.E.2d 841 (1993); Coble Cranes & Equip. Co. v. B & W Utils., Inc., 111 N.C. App. 910, 433 S.E.2d 464 (1993); Miller v. Talton, 112 N.C. App. 484, 435 S.E.2d 793 (1993); House Healers Restorations, Inc. v. Ball, 112 N.C. App. 783, 437 S.E.2d 383 (1993).

Quoted in Sharrard, McGee & Co. v. Suz's Software, Inc., 100 N.C. App. 428, 396 S.E.2d 815 (1990); Ford v. NCNB Corp., 104 N.C. App. 172, 408 S.E.2d 738 (1991).

Cited in Carolina-Atlantic Distribs., Inc. v. Boyce Insulation Co., 99 N.C. App. 577, 393 S.E.2d 337 (1990); In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991); Hoots v. Pryor, 106 N.C. App. 397, 417 S.E.2d 269 (1992); Westinghouse v. Hair, 107 N.C. App. 106, 418 S.E.2d 532 (1992); Golden Rule Ins. Co. v. Long, 113 N.C. App. 187, 439 S.E.2d 599 (1993); Garrity v. Morrisville Zoning Bd. of Adjustment, 115 N.C. App. 273, 444 S.E.2d 653, cert. denied, 337 N.C. 692, 448 S.E.2d 523 (1994); City of Winston-Salem v. Yarbrough, 117 N.C. App. 340, 451 S.E.2d 358 (1994).

II. AMENDMENTS TO CONFORM TO EVIDENCE.

Party who fails to object to evidence, etc. —

Where one of the "new" issues in an amended complaint was sufficiently pled in the complaint, defendant had notice and could not complain of its amendment; where evidence sustaining the other issues in the complaint did not tend to support any properly pled issue and because defendant never specifically objected to that evidence as being outside the scope of the pleadings, he impliedly consented to trial on those issues. Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993).

Where there was no warning in the complaint of a punitive damages claim, and no consent by defendant to such a claim, it was within the discretion of the trial court to deny plaintiff's motion to amend to add a claim for punitive damages based upon gross negligence. Enns v. Zayre Corp., 116 N.C. App. 687, 449 S.E.2d 478 (1994), cert. denied, — N.C. —, 454 S.E.2d 649 (1995).

III. RELATION BACK OF AMENDMENTS.

Amendment of Date Permitted. — Where both the original and amended complaints allege that plaintiff was injured in a collision between a vehicle driven by defendant and another vehicle in which plaintiff was a passenger, aside from the changes made by the first amended complaint, the only difference between the original and the second amended complaint is the year in which the accident occurred and that is sufficient to give the notice called for by Rule 15(c). Wooten v. Warren ex rel. Gilmer, 117 N.C. App. 350, 451 S.E.2d 342 (1994).

Relation Back Denied. — Trial court did not err in refusing to allow relation back of a complaint where the proper party did not know that, but for a mistake concerning identity, the action would have brought against him within the period prescribed by law. Crossman v. Moore, 115 N.C. App. 372, 444 S.E.2d 630, cert. denied, 337 N.C. 690, 448 S.E.2d 519 (1994).

Plaintiff's amended complaint did not relate back to the date of the original complaint, because the plaintiff failed to establish that the added parties received notice or should have known of the action against them within the limitation period. Stewart Enters. v. MRM Constr. Co., 116 N.C. App. 604, 449 S.E.2d 20 (1994).

Since amendment to complaint could not relate back to the original pleading, plaintiffs' claim against hospital was barred by the statute of limitations. Medford v. Haywood County Hosp. Found., 115 N.C. App. 474, 444 S.E.2d 699, cert. granted, 337 N.C. 802, 449 S.E.2d 747 (1994).

Amendment to Adoption Petition Held Not to Relate Back. — Where termination order, later held to be invalid for failure to use due diligence in ascertaining the putative father's address, was filed with an adoption petition in lieu of the affidavit required by § 48-13, a subsequently filed affidavit did not relate back to the original filing date of the petition so as to cut off the rights of the putative father who filed a legitimation petition to § 49-10 before the affidavit was filed. In re Adoption of Clark, 327 N.C. 61, 393 S.E.2d 791 (1990).

IV. SUPPLEMENTAL PLEADINGS.

Supplemental Pleading to Show Change in Capacity in Which Plaintiff Sues. —

Where the original pleading gives sufficient notice of the transaction and occurrences upon which the claim is based, a supplemental pleading that merely changes the capacity in which the plaintiff sues relates back to the commencement of the action. Westinghouse v. Hair, 107 N.C. App. 106, 418 S.E.2d 532 (1992).

Rule 16. Pre-trial procedure; formulating issues.

CASE NOTES

Names of Witnesses and List of Exhibits. — With the exception of expert trial witnesses, whose identities are discoverable under 1A-1, Rule 26(b)(4), a party is not entitled to find out, by discovery, which witnesses his opponent intends to call, or the documents and exhibits a party opponent intends to present at the trial; instead, the names of witnesses and lists of exhibits a party opponent intends to use at trial are obtainable through a pretrial conference. King v. Koucouliotes, 108 N.C. App. 751, 425 S.E.2d 462, cert. granted, 334 N.C. 163, 432 S.E.2d 361, discretionary review improvidently granted, 335 N.C. 164, 436 S.E.2d 132 (1993).

Cited in Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

ARTICLE 4.

Parties.

Rule 17. Parties plaintiff and defendant; capacity.

(a) *Real party in interest.* — Every claim shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the State so provides, an action for the use or benefit of another shall be brought in the name of the State of North Carolina. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) *Infants, incompetents, etc.* —

(1) Infants, etc., Sue by Guardian or Guardian Ad Litem. — In actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, whether residents or nonresidents of this State, they must appear by

general or testamentary guardian, if they have any within the State or by guardian ad litem appointed as hereinafter provided; but if the action or proceeding is against such guardian, or if there is no such known guardian, then such persons may appear by guardian ad litem.

(2) Infants, etc., Defend by Guardian Ad Litem. — In actions or special proceedings when any of the defendants are infants or incompetent persons, whether residents or nonresidents of this State, they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided; and if they have no known general or testamentary guardian in the State, and any of them have been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such infants, or incompetent persons, and fix and tax his fee as part of the costs. The guardian so appointed shall, if the cause is a civil action, file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After 20 days' notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant or incompetent persons or defendants.

All orders or final judgments duly entered in any action or special proceeding prior to April 8, 1974, when any of the defendants were infants or incompetent persons, whether residents or nonresidents of this State, and were defended therein by a general or testamentary guardian or guardian ad litem, and summons and complaint or petition in said action or special proceeding were duly served upon the guardian or guardian ad litem and answer duly filed by said guardian or guardian ad litem, shall be good and valid notwithstanding that said order or final judgment was entered less than 20 days after notice of the summons and complaint served upon said guardian or guardian ad litem.

(3) Appointment of Guardian Ad Litem Notwithstanding the Existence of a General or Testamentary Guardian. — Notwithstanding the provisions of subsections (b)(1) and (b)(2), a guardian ad litem for an infant or incompetent person may be appointed in any case when it is deemed by the court in which the action is pending expedient to have the infant, or insane or incompetent person so represented, notwithstanding such person may have a general or testamentary guardian.

(4) Appointment of Guardian Ad Litem for Unborn Persons. — In all actions in rem and quasi in rem and in all actions and special proceedings which involve the construction of wills, trusts and contracts or any instrument in writing, or which involve the determination of the ownership of property or the distribution of property, if there is a possibility that some person may thereafter be born who, if then living,

would be a necessary or proper party to such action or special proceeding, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem to defend on behalf of such unborn person. Service upon the guardian ad litem appointed for such unborn person shall have the same force and effect as service upon such unborn person would have had if such person had been living. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(5) Appointment of Guardian Ad Litem for Corporations, Trusts, or Other Entities Not in Existence. — In all actions which involve the construction of wills, trusts, contracts or written instruments, or the determination of the ownership of property or the disposition or distribution of property pursuant to the provisions of a will, trust, contract or written instrument, if such will, trust, contract or written instrument provides benefits for disposition or distribution of property to a corporation, a trust, or an entity thereafter to be formed for the purpose of carrying into effect some provision of the said will, trust, contract or written instrument, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem for such corporation, trust or other entity. Service upon the guardian ad litem appointed for such corporation, trust or other entity shall have the same force and effect as service upon such corporation, trust or entity would have had if such corporation, trust or other entity had been in existence. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(6) Repealed by Sessions Laws 1981, c. 599, s. 1.

(7) Miscellaneous Provisions. — The provisions of this rule are in addition to any other remedies or procedures authorized or permitted by law, and it shall not be construed to repeal or to limit the doctrine of virtual representation or any other law or rule of law by which unborn persons or nonexistent corporations, trusts or other entities may be represented in or bound by any judgment or order entered in any action or special proceeding. This rule shall apply to all pending actions and special proceedings to which it may be constitutionally applicable. All judgments and orders heretofore entered in any action in which a guardian or guardians ad litem have been appointed for any unborn person or persons or any nonexistent corporations, trusts or other entities, are hereby validated as of the several dates of entry thereof in the same manner and to the full extent that they would have been valid if this rule had been in effect at the time of the appointment of such guardians ad litem; provided, however, that the provisions of this sentence shall be applicable only in such cases and to the extent to which the application thereof shall not be prevented by any constitutional limitation.

(c) *Guardian ad litem for infants, insane or incompetent persons; appointment procedure.* — When a guardian ad litem is appointed to represent an infant or insane or incompetent person, he must be appointed as follows:

(1) When an infant or insane or incompetent person is plaintiff, the appointment shall be made at any time prior to or at the time of the commencement of the action, upon the written application of any relative or friend of said infant or insane or incompetent person or by the court on its own motion.

(2) When an infant is defendant and service under Rule 4(j)(1)a is made upon him the appointment may be made upon the written application of any relative or friend of said infant, or, if no such application is made within 10 days after service of summons, upon the written application of any other party to the action or, at any time by the court on its own motion.

(3) When an infant or insane or incompetent person is defendant and service can be made upon him only by publication, the appointment may be made upon the written application of any relative or friend of said infant, or upon the written application of any other party to the action, or by the court on its own motion, before completion of publication, whereupon service of the summons with copy of the complaint shall be made forthwith upon said guardian so appointed requiring him to make defense at the same time that the defendant is required to make defense in the notice of publication.

(4) When an insane or incompetent person is defendant and service by publication is not required, the appointment may be made upon the written application of any relative or friend of said defendant, or upon the written application of any other party to the action, or by the court on its own motion, prior to or at the time of the commencement of the action, and service upon the insane or incompetent defendant may thereupon be dispensed with by order of the court making such appointment.

(d) *Guardian ad litem for persons not ascertained or for persons, trusts or corporations not in being.* — When under the terms of a written instrument, or for any other reason, a person or persons who are not in being, or any corporation, trust, or other legal entity which is not in being, may be or may become legally or equitably interested in any property, real or personal, the court in which an action or proceeding of any kind relative to or affecting such property is pending, may, upon the written application of any party to such action or proceeding or of other person interested, appoint a guardian ad litem to represent such person or persons not ascertained or such persons, trusts or corporations not in being.

(e) *Duty of guardian ad litem; effect of judgment or decree where party represented by guardian ad litem.* — Any guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules, unless extension of time is obtained. After the appointment of a guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability, had been ascertained and in being, and had been present in court after legal notice in the action in which such final judgment, order or decree is entered. (1967, c. 954, s. 1; 1969, c. 895, ss. 5, 6; 1971, c. 1156, ss. 3, 4; 1973, c. 1199; 1981, c. 599, s. 1; 1987, c. 550, s. 13.)

CASE NOTES

I. In General.
II. Real Party in Interest.
III. Infants and Incompetents.

I. IN GENERAL.

Applied in Westinghouse v. Hair, 107 N.C. App. 106, 418 S.E.2d 532 (1992); Lawrence v. Wetherington, 108 N.C. App. 543, 423 S.E.2d 829 (1993).

Stated in Union Grove Milling & Mfg. Co. v. Faw, 109 N.C. App. 248, 426 S.E.2d 476 (1993).

Cited in Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993).

II. REAL PARTY IN INTEREST.

Standing of Association to Bring Suit. — An association may properly bring suit only if: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Landfall Group Against Paid Transferability v. Landfall Club, Inc., 117 N.C. App. 270, 450 S.E.2d 513 (1994).

III. INFANTS AND INCOMPETENTS.

The statute does not require, nor does it imply that it is the respondent's responsibility to ask for appointment of the guardian ad litem. Richard v. Michna, 110 N.C. App. 810, 431 S.E.2d 485 (1993).

Appeal from Order Appointing Guardian Ad Litem. — Plaintiff gave notice of appeal from an interlocutory order, namely, one granting defendant's motions for the appointment of a guardian ad litem. As this order was not a final judgment, for plaintiff to have been entitled to appeal of right from the order, plaintiff was required to establish that the order either: (1) affected a substantial right, or (2) in effect determined the action and prevented a judgment from which appeal might be taken, or (3) discontinued the action, or (4) granted or refused a new trial. Culton v. Culton, 327 N.C. 624, 398 S.E.2d 323 (1990).

Standing to Challenge Appointment on Appeal. — Because he was not an aggrieved party, plaintiff had no standing to challenge on appeal trial court's order appointing a guardian ad litem for defendant. Culton v. Culton, 327 N.C. 624, 398 S.E.2d 323 (1990).

A guardian ad litem must always be appointed for a minor child in a termination, etc. —

In accord with the main volume. See In re Finnican, 104 N.C. App. 157, 408 S.E.2d 742 (1991).

Rule 18. Joinder of claims and remedies.

CASE NOTES

Stated in Bockweg v. Anderson, 333 N.C. 486, 428 S.E.2d 157 (1993).

Cited in Corum v. University of N.C. ex rel. Bd. of Governors, 330 N.C. 761, 413 S.E.2d 276, reh'g denied, 331 N.C. 558, 418 S.E.2d 664, cert. denied, — U.S. —, 113 S. Ct. 493, 121 L. Ed. 2d 431 (1992).

Rule 19. Necessary joinder of parties.

CASE NOTES

I. In General.

I. IN GENERAL.

Proper Parties May Be Joined. — Sisters, although united in interest with their brother in trust estate, were proper, not necessary, parties and did not have to be joined in his claim against decedent's estate for his alleged breach of his fiduciary duty as trustee. Pittman v. Barker, 117 N.C. App. 580, 452 S.E.2d 326, cert. denied, 340 N.C. 261, 456 S.E.2d 833 (1995).

Absence of necessary party does not merit dismissal. The absence of a necessary party under this rule does not merit dismissal of the action. City of Albemarle v. Security Bank and Trust Co., 106 N.C. App. 75, 415 S.E.2d 96 (1992).

Husband of plaintiff in paternity suit was not a necessary party where a court had previously determined that he was not the father. Only the interests of the defendant, the alleged father, would be directly affected by the outcome of the litigation. Lombroia v. Peek, 107 N.C. App. 745, 421 S.E.2d 784 (1992).

A dispute as to the extinguishment of a subdivision easement by abandonment or adverse possession could not be resolved without the joinder of the grantor or his heirs, who retained fee title to the soil, and the record owners of lots in the subdivision, who had user rights in the easement. Rice v. Randolph, 96 N.C. App. 112, 384 S.E.2d 295 (1989).

The note above has been set out to correct a typographical error in the main pamphlet.

Lessor, Rather Than Assignee of Lease, Held to Be Real Party in Interest in Action Against Lessees. — Language of an assignment of a lease clearly established that lessor assigned only the right to rent payments, and plaintiff retained all other rights under the lease, including right to enforce lessees' tax obligation under lease; thus, the lessor was a real party in interest in action against lessees who defaulted under lease. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Since assignee of lease received no right in the assignment to collect taxes from lessees, assignee's presence in the case brought by assignor/lessor against lessee for failure to pay taxes under lease was not necessary for a complete determination, and any judgment entered could not prejudice either assignees or the lessees. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Applied in Booher v. Frue, 98 N.C. App. 585, 392 S.E.2d 105 (1990); Stokes v. Southeast Hotel Properties, Ltd., 877 F. Supp. 986 (W.D.N.C. 1994).

Cited in Booher v. Frue, 98 N.C. App. 570, 394 S.E.2d 816 (1990); Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993).

Rule 20. Permissive joinder of parties.

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in Oxendine v. Bowers, 100 N.C. App. 712, 398 S.E.2d 57 (1990).

Stated in Swain v. Leahy, 111 N.C. App. 884, 433 S.E.2d 460 (1993).

Rule 23. Class actions.

Legal Periodicals. — For note, "Shareholder Derivative Suits Under the New North Carolina Business Corporations Act," see 68 N.C. L. Rev. 1091 (1990).

CASE NOTES

I. In General.

I. IN GENERAL.

Federal Rules and Cases. — Both the North Carolina Rules of Civil Procedure and the Federal Rules of Civil Procedure contain a requirement that the complaint initiating a shareholder derivative action be verified under oath. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Because the present federal rule and its predecessors (which also contained a verification requirement) have been interpreted and discussed widely, the Supreme Court will turn to federal cases to elucidate the purpose behind this requirement. Certain aspects of this rule and the procedures in North Carolina governing derivative suits may differ from the federal approach; however, insofar as the purposes of certain of the federal and State rules are congruent, cases explaining federal rules are helpful. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

This rule should receive a liberal construction, etc. —

In accord with main volume. See Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420.

The requirements for a class action, etc. —

In accord with the main volume. See Perry v. Union Camp Corp., 100 N.C. App. 168, 394 S.E.2d 681 (1990).

Court Must Make Findings of Fact Regarding Class Certification. — Findings of fact are required by the trial court when rendering a judgment granting or denying class certification in order for the appellate courts to afford meaningful review under the abuse of discretion standard. Such findings must be made with sufficient specificity to allow effective appellate review. Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 623 (1993).

Plaintiffs were entitled to proceed as a class against corporate purchaser on the claims contained in the original complaint because the transfer occurred after the court certified the action as a class action, they had knowledge of the claims being asserted against seller at the time the transfer was made, and as transferee of all the assets, purchased the contracts which were the subject matter of the plaintiffs' original complaint. Dublin v. UCR, Inc., 115 N.C. App. 209, 444 S.E.2d 455, appeal dismissed and cert. denied, — N.C. —, 449 S.E.2d 569 (1994).

Court Supervision of Communications With Potential Class Members Not Abuse of Discretion. — In a class action challenging interest rates that were charged in financing the purchase of mobile homes, trial court did not abuse its discretion in supervising communications with potential class members, as the trial court did not allow unlimited unsupervised communications with potential class members and restricted contact to the level it deemed appropriate at that stage of litigation. Gibbons v. CIT Group/Sales Fin., Inc., 101 N.C. App. 502, 400 S.E.2d 104, cert. denied, 329 N.C. 496, 407 S.E.2d 856 (1991).

Notice to Members of Class Required. —

The North Carolina Supreme Court has held that fundamental fairness and due process require that adequate notice be given to the members of a class. Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

An order denying certification of a class action is appealable. Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 623 (1993).

While an order denying a class certification is interlocutory, it is nonetheless immediately appealable as it affects a substantial right of the unnamed plaintiffs. Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420, cert. denied, 334 N.C. 162, 432 S.E.2d 358, aff'd per curiam, 335 N.C. 158, 436 S.E.2d 821 (1993).

Review of Order Denying Class Certification. — The decision to grant or deny class certification rests within the sound discretion of the trial court; therefore, the appropriate standard for appellate review is whether the trial court's decision manifests an abuse of discretion. In this regard, an appellate court is bound by the court's findings of fact if they are supported by competent evidence. Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 623 (1993).

Certification of Class Held Proper. — The trial court properly certified suit as a class action where the class was divided into six subclasses, three of these consisting of living persons who retired as vested members of the Retirement System, and three of these subclasses consisting of living beneficiaries, heirs, or personal representatives of persons comprising the first three subclasses in an action regarding calculation of disability payments. Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420, cert. denied, 334 N.C. 162, 432 S.E.2d 358, aff'd per curiam, 335 N.C. 158, 436 S.E.2d 821 (1993).

Procedure and Discovery in Shareholders' Derivative Actions. — For a case discussing interplay of rules and statutes governing procedure and discovery in shareholders' derivative action, particularly with respect to former § 55-55(c) (see now § 55-7-40(d)), this rule, and § 1A-1, Rules 12 and 56, see Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Verification Requirement Not Jurisdictional. — Although complaint in shareholders' derivative suit was not properly verified, because § 1A-1, Rule 23(b) addresses the procedure to be followed in, and not the substantive elements of, a shareholder's derivative suit, plaintiffs' failure to comply with the verification requirement at the time the complaint was filed was not a jurisdictional defect. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Where Purposes of Verification Requirement Have Been Met. — Because this rule's verification requirement is not jurisdictional in nature, where the purposes behind the rule have been fulfilled by the time the objection to a defective or absent verification is lodged, dismissal or summary judgment in favor of defendants is not appropriate. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Defendants waived their objection to lack of proper verification in shareholders' derivative suit by failing to raise the issue of verification until the fourth time the case was heard in the appellate division. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Because defendants raised the verification issue for the first time in appellate briefs before the Supreme Court, over seven years after the complaint was filed, and after many years of active litigation of the suit, defendants waived their right to complain about verification. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Quoted in In re Triscari Children, 109 N.C. App. 285, 426 S.E.2d 435 (1993).

Cited in Granville County Bd. of Comm'rs v. North Carolina Hazardous Waste Mgt. Comm'n, 329 N.C. 615, 407 S.E.2d 785 (1991).

Rule 24. Intervention.

CASE NOTES

I. In General.

I. IN GENERAL.

Motion for Intervention Denied. — Where claimants to client security fund did not have an interest in the funds held by the trustee/conservator, the trial properly denied motion for intervention. In re Gertzman, 115 N.C. App. 634, 446 S.E.2d 130, cert. denied, 337 N.C. 801, 449 S.E.2d 571 (1994).

Applied in State ex rel. Long v. Interstate Cas. Ins. Co., 106 N.C. App. 470, 417 S.E.2d 296 (1992); Surles v. Surles, 113 N.C. App. 32, 437 S.E.2d 661 (1993).

Stated in State ex rel. Long v. Interstate Cas. Ins. Co., 106 N.C. App. 470, 417 S.E.2d 296 (1992).

Cited in Sparks v. Nationwide Mut. Ins. Co., 99 N.C. App. 148, 392 S.E.2d 415 (1990); In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991).

Rule 25. Substitution of parties upon death, incompetency or transfer of interest; abatement.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992).

ARTICLE 5.

Depositions and Discovery.

Rule 26. General provisions governing discovery.

Cross References. — As to time for beginning and completing discovery, see Gen. Rules Proc., Rule 8, in the Annotated Rules of North Carolina.

Legal Periodicals. — For article, "Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking," see 69 N.C.L. Rev. 795 (1991).

CASE NOTES

I. In General.
II. Scope of Discovery Generally.
V. Protective Orders.

I. IN GENERAL.

The purpose and intent of this rule, etc. —

The purpose behind section (e) of this rule is to prevent a party with discoverable information from making untimely, evasive, or incomplete responses to requests for discovery. Bumgarner v. Reneau, 332 N.C. 624, 422 S.E.2d 686 (1992).

The imposition of sanctions under § 1A-1, Rule 37, etc. —

In accord with the main volume. See Bumgarner v. Reneau, 332 N.C. 624, 422 S.E.2d 686 (1992).

Sanction for Taking Deposition in Violation of Rules. — Striking of the notice of the taking of a deposition and prohibiting its further use was a reasonable sanction for a deposition procured in violation of deposition rules, even though it was defendant's counsel, and not defendant itself, who committed the acts giving rise to the sanction. Turner v. Duke Univ., 101 N.C. App. 276, 399 S.E.2d 402, cert. denied, 329 N.C. 504, 407 S.E.2d 552 (1991).

Sanctions for Improper Discovery. — A motion under the more specific rule governing sanctions in the context of discovery responses is the proper avenue for sanctioning improper conduct relative to discovery. Brooks v. Giesey, 334 N.C. 303, 432 S.E.2d 339 (1993).

Sanctions Under Subsection (g). — The imposition of sanctions for discovery abuses under subsection (g) informs offending counsel of exactly what action is being sanctioned. This process alleviates any due process concerns an attorney might raise by claiming not to know which of his or her actions merit sanctions. Brooks v. Giesey, 334 N.C. 303, 432 S.E.2d 339 (1993).

Applied in Jennings v. Jessen, 103 N.C. App. 739, 407 S.E.2d 264 (1991); Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991).

Stated in Cantwell v. Cantwell, 109 N.C. App. 395, 427 S.E.2d 129 (1993).

Cited in Prince v. Duke Univ., 326 N.C. 787, 392 S.E.2d 388 (1990); Cantwell v. Cantwell, 109 N.C. App. 395, 427 S.E.2d 129 (1993); Pugh v. Pugh, 113 N.C. App. 375, 438 S.E.2d 214 (1994); Clark v. Perry, 114 N.C. App. 297, 442 S.E.2d 57 (1994).

II. SCOPE OF DISCOVERY GENERALLY.

The relevancy test for discovery, etc. —

The test of relevancy under subsection (b) of this rule differs from the more stringent test of relevancy under § 8C-1, Rule 401. Adams v. Lovette, 105 N.C. App. 23, 411 S.E.2d 620, aff'd, 332 N.C. 659, 422 S.E.2d 575 (1992).

Records Irrelevant for Discovery Purposes. — Whether or not plaintiff's replacement had a relationship with a high school student during his previous employment, the complete student records at high school and school personnel records were irrelevant to whether defendants intentionally inflicted emotional distress on plaintiff, constructively and wrongfully discharged her, or maliciously interfered with her contract; therefore, the trial court did not abuse its discretion in denying motion to compel discovery. Wagoner v. Elkin City Schs. Bd. of Educ., 113 N.C. App. 579, 440 S.E.2d 119, cert. denied, 336 N.C. 615, 447 S.E.2d 414 (1994).

The determination of whether and when to convene a discovery conference is a matter left to the discretion of the trial judge. Gibbons v. CIT Group/Sales Fin., Inc., 101 N.C. App. 502, 400 S.E.2d 104, cert. denied, 329 N.C. 496, 407 S.E.2d 856 (1991).

Discovery Plan Required for Discovery Conference. — While § 1A-1, Rule 26(f) requires the court to impose a discovery plan if a discovery conference is held, court is not obligated to impose discovery plan if no discovery conference has been held. Gibbons v. CIT Group/Sales Fin., Inc., 101 N.C. App. 502, 400 S.E.2d 104, cert. denied, 329 N.C. 496, 407 S.E.2d 856 (1991).

Other Witnesses and Exhibits. — With the exception of expert trial witnesses, whose identities are discoverable under the provisions of subdivision (b)(4) of this rule, a party is not entitled to find out, by discovery, which witnesses his opponent intends to call, or the documents and exhibits a party opponent intends to present at the trial; instead, the names of witnesses and lists of exhibits a party opponent intends to use at trial are obtainable through the pretrial conference. King v. Koucouliotes, 108 N.C. App. 751, 425 S.E.2d 462, cert. granted, 334 N.C. 163, 432 S.E.2d 361, discretionary review improvidently granted, 335 N.C. 164, 436 S.E.2d 132 (1993).

V. PROTECTIVE ORDERS.

Nullified by Dismissal. — Where plaintiff entered a dismissal in her action for claim and delivery, her argument that trial court erred in entering protective order concerning possession was moot, as the protective order was nullified by plaintiff's dismissal. Doe v. Duke Univ., 118 N.C. App. 406, 455 S.E.2d 470 (1995).

Rule 28. Persons before whom depositions may be taken.

(a) *Within the United States.* — Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before a person authorized to administer oaths by the laws of this State, of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(b) *In foreign countries.* — Depositions may be taken in a foreign country:

(1) Pursuant to any applicable treaty or convention;
(2) Pursuant to a letter of request, whether or not captioned a letter rogatory;
(3) On notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States; or

(4) Before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed "To the Appropriate Authority in (here name the country)." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter of request need not be excluded merely because the testimony was not taken under oath, or any similar departure from the requirements for depositions taken within the United States under these rules.

(c) *Disqualification for interest.* — No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action unless the parties agree otherwise by stipulation as provided in Rule 29.

(d) *Depositions to be used outside this State.* —

(1) A person desiring to take depositions in this State to be used in proceedings pending in the courts of any other state or country may present to a judge of the superior or district court a commission, order, notice, consent, or other authority under which the deposition is to be taken, whereupon it shall be the duty of the judge to issue the necessary subpoenas pursuant to Rule 45. Orders of the character provided in Rules 30(b), 30(d), and 45(b) may be made upon proper application therefor by the person to whom such subpoena is directed. Failure by any person without adequate excuse to obey a subpoena served upon him pursuant to this rule may be deemed a contempt of the court from which the subpoena issued.

(2) The commissioner herein provided for shall not proceed to act under and by virtue of his appointment until the party seeking to obtain such deposition has deposited with him a sufficient sum of money to cover all costs and charges incident to the taking of the deposition, including such witness fees as are allowed to witnesses in this State for attendance upon the superior court. From such deposit the commissioner shall retain whatever amount may be due him for services, pay the witness fees and other costs that may have been incurred by reason of taking such deposition, and if any balance remains in his hands, he shall pay the same to the party by whom it was advanced. (1967, c. 954, s. 1; 1975, c. 762, s. 2; 1995, c. 389, s. 4.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to civil actions filed on or after that date, rewrote subsection (b).

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in State v. Thompson, 110 N.C. App. 217, 429 S.E.2d 590 (1993).

Cited in Kearney v. County of Durham, 99 N.C. App. 349, 393 S.E.2d 129 (1990); Pugh v. Pugh, 111 N.C. App. 118, 431 S.E.2d 873 (1993).

Rule 30. Depositions upon oral examination.

(a) *When depositions may be taken.* — After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (i) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (ii) if special notice is given as provided in subsection (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45, provided that no subpoena need be served on a deponent who is a party or an officer, director or managing agent of a party, provided the party has been served with notice pursuant to subsection (b)(1) of this rule. The deposition of a person confined in prison or of a patient receiving in-patient care in or confined to an institution or hospital for the mentally ill or mentally handicapped may be taken only by leave of court on such terms as the court prescribes.

(b) *Notice of examination; general requirements; place of examination; special notice; nonstenographic recording; production of documents and things; deposition of organization.* —

(1) A party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice. The notice shall be served on all parties at least 15 days prior to the taking of the deposition when any party required to be served resides without the State and shall be served on all parties at least 10 days prior to the taking of the deposition when all of the parties required to be served reside within the State. Depositions of parties, officers, directors or managing agents of parties or of other persons designated pursuant to subsection (b)(6) hereof to testify on behalf of a party may be taken only at the following places:

A resident of the State may be required to attend for examination by deposition only in the county wherein he resides or is employed or transacts his business in person. A nonresident of the State may be required to attend for such examination only in the county wherein he resides or within 50 miles of the place of service except that a judge, as defined by subdivision (h) of this rule, may, upon motion showing good cause, require that a party who selected the county where the action is pending as the forum for the action or an officer, director of managing agent of such a party, or a person designated pursuant to subsection (b)(6) hereof to testify on behalf of such a party present himself for the taking of his deposition in the county where the action is pending. The judge upon granting the motion may make any other orders allowed by Rule 26(c) with respect thereto, including orders with respect to the expenses of the deponent.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (i) states that the person to be examined is about to go out of the county where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (ii) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this subsection (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) Unless the court orders otherwise, testimony at a deposition may be recorded by sound recording, sound-and-visual, or stenographic means/methods. If the testimony is to be taken by other means in addition to or in lieu of stenographic means, the notice shall state the methods by which it shall be taken and shall state whether a stenographer will be present at the deposition. In the case of a deposition taken by stenographic means, the party that provides for the stenographer shall provide for the transcribing of the testimony taken. If the deposition is by sound recording only, the party noticing the deposition shall provide for the transcribing of the testimony taken. If the deposition is by sound-and-visual means, the appearance or demeanor of deponents or attorneys shall not be distorted through camera techniques. Regardless of the method stated in the notice, any party or the deponent may have the testimony recorded by stenographic means.

(5) A party deponent, deponents who are officers, directors or managing agents of parties and other persons designated pursuant to subsection (b)(6) hereof to testify on behalf of a party may not be served with a subpoena duces tecum, but the notice to a party for the deposition of such a deponent may be accompanied by a request made in compliance with

Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34, except as to time for response, shall apply to the request. When a notice to take such a deposition is accompanied by a request made in compliance with Rule 34 the notice and the request must be served at least 15 days earlier than would otherwise be required by Rule 30(b)(1), and any objections to such a request must be served at least seven days prior to the taking of the deposition.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. It shall not be necessary to serve a subpoena on an organization which is a party, but the notice, served on a party without an accompanying subpoena shall clearly advise such of its duty to make the required designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28(a), 37(a)(1) and 45(d), a deposition taken by telephone is taken in the district and the place where the deponent is to answer questions propounded to him.

(c) *Examination and cross-examination; record of examination; oath; objections.* — Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of Rule 43(b). The person before whom the deposition is to be taken shall put the deponent on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the deponent. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subsection (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the person before whom the deposition is taken, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the deposition by the person before whom the deposition is taken. Subject to any limitations imposed by orders entered pursuant to Rule 26(c) or 30(d), evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party who served the notice of taking the deposition, and he shall transmit them to the person before whom the deposition is to be taken who shall open them at the deposition, propound them to the witness and record the answers verbatim.

(d) *Motion to terminate or limit examination.* — At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, a judge of the court in which the action is pending or any judge in the county where the deposition is being taken may order before whom the examination is being taken to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of a judge of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) *Submission to deponent; changes; signing.* — The sound-and-visual recording, or the transcript of it, if any, the transcript of the sound recording, or the transcript of a deposition taken by stenographic means, shall be submitted to the deponent for examination and shall be reviewed by the deponent, unless such examination and review are waived by the deponent and by the parties. If there are changes in form or substance, the deponent shall sign a statement reciting such changes and the reasons given by the deponent for making them. The person administering the oath shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent. The certificate shall then be signed by the deponent, unless the parties by stipulation waive the signing or the deponent is ill or cannot be found or refuses to sign. If the certificate is not signed by the deponent within 30 days of its submission to him, the person before whom the deposition was taken shall sign the certificate and state on the certificate the fact of the waiver or of the illness or absence of the deponent or the fact of the refusal or failure to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though the certificate were signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) *Certification and filing by person administering the oath; exhibits; copies; notice of filing.* —

(1) The person administering the oath shall certify that the deponent was duly sworn by him and that the deposition is a true record of the testimony given by the deponent. This certificate shall be in writing and accompany the sound-and-visual or sound recording or transcript of the deposition. He shall then place the deposition in an envelope or package endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall personally deliver it or mail it by first class mail to the party taking the deposition or his attorney who shall preserve it as the court's copy.

Documents and things produced for inspection during the examination of the deponent shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (i) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (ii) if the person producing the materials requests their return, the person before whom the deposition is taken shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the person administering the oath shall furnish a copy of the deposition to any party or to the deponent.

(3) The clerk shall give prompt notice of the filing of a deposition to all parties.

(g) *Failure to attend or to serve subpoena; expenses.* —

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the judge may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the judge may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(h) *Judge; definition.* —

(1) In respect to actions in the superior court, a judge of the court in which the action is pending shall, for the purposes of this rule, and Rule 26, Rule 31, Rule 33, Rule 34, Rule 35, Rule 36 and Rule 37, be a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in that county.

(2) In respect to actions in the district court, a judge of the court in which the action is pending shall, for the purposes of this rule, Rule 26, Rule 31, Rule 33, Rule 34, Rule 35, Rule 36 and Rule 37, be the chief district judge or any judge designated by him pursuant to G.S. 7A-192.

(3) In respect to actions in either the superior court or the district court, a judge of the court in the county where the deposition is being taken shall, for the purposes of this rule, be a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in that county, or the chief judge of the district court or any judge designated by him pursuant to G.S. 7A-192. (1967, c. 954, s. 1; 1973, c. 828, s. 1; c. 1126, ss. 1, 2; 1975, c. 762, s. 2; 1977, c. 769; 1983, c. 201, s. 2; c. 801, ss. 1, 2; 1987 (Reg. Sess., 1988), c. 1037, s. 42; 1995, c. 353, ss. 1-3.)

Editor's Note. — The word "/methods" was added at the end of subdivision (b)(4) at the direction of the Revisor of Statutes.

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to any cases filed on or after that date, rewrote subdivision (b)(4) and subsection (e); and in subsection (f) substituted "person administering the oath" for "officer" throughout; and in subdivision (f)(1) added the second sentence, and inserted "or package" in the third sentence.

Rule 32. Use of depositions in court proceedings.

CASE NOTES

Use of Depositions at Trial Stage Limited. —

Oral testimony is more desirable, but a deposition may be used if a witness is unavailable. Investors Title Ins. Co. v. Herzig, 330 N.C. 681, 413 S.E.2d 268 (1992).

There is no distinction between a discovery deposition and a trial deposition, under this rule. Robertson v. Nelson, 116 N.C. App. 324, 447 S.E.2d 488 (1994).

Admittance of Portion of Deposition Does Not Require Admittance of Entire Deposition. — Trial court did not err in allowing in evidence selected portions of each of the two plaintiffs' depositions and in overruling plaintiffs' motions that the entire depositions be admitted. Plaintiffs' reliance on this section was misplaced since plaintiffs alleged a right to have the entire depositions admitted once a portion had been offered into evidence; this section allows the admission of "any other part which is relevant to the part introduced." Lenins v. K-Mart Corp., 98 N.C. App. 590, 391 S.E.2d 843 (1990).

Incarcerated Parent in Parental Termination Proceeding. — When an incarcerated parent is denied transportation to the hearing in contested termination cases, the better practice is for the court, when so moved, to provide the funds necessary for the deposing of the incarcerated parent. The parent's deposition, combined with representation by counsel at the hearing, will ordinarily provide sufficient participation by the incarcerated parent so as to reduce the risk of error attributable to his absence to a level consistent with due process. In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158, appeal dismissed, 332 N.C. 483, 424 S.E.2d 397 (1992).

Insufficient Evidence of Witness's Illness. — Party's attorney failed to offer sufficient proof of a witness's alleged illness, and the trial court did not abuse its discretion in refusing to admit testimony under subdivision (a)(4), where the attorney orally stated that he had received the information that witness was ill from the witness's wife over the telephone, and offered no other form of proof concerning the alleged illness. Vandervoort v. McKenzie, 117 N.C. App. 152, 450 S.E.2d 491 (1994).

Judicial Notice of Distance Between Cities Not Required. — Where an attorney sought to have a deposition admitted pursuant to subdivision (a)(4) of the Rules of Civil Procedure by asserting that the witness was more than 100 miles from the place of trial, the trial court did not abuse its discretion by declining to take judicial notice of the distance between two cities. Vandervoort v. McKenzie, 117 N.C. App. 152, 450 S.E.2d 491 (1994).

Cited in Hassett v. Dixie Furn. Co., 104 N.C. App. 684, 411 S.E.2d 187 (1991).

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

CASE NOTES

I. In General.

I. IN GENERAL.

Asserting Work Product Privilege Insufficient Without Written Objection or Protective Order. — Assertion by counsel of a work product privilege to the tapes and transcripts was insufficient to meet the requirements of this rule where he did not file a written objection nor seek a protective order, and his failure to do either entitled the opposing party to proceed under Rule 37(d). Pugh v. Pugh, 113 N.C. App. 375, 438 S.E.2d 214 (1994).

Applied in Kirkhart v. Saieed, 107 N.C. App. 293, 419 S.E.2d 580 (1992).

Rule 36. Requests for admission; effect of admission.

CASE NOTES

Failure to Respond to Plaintiff's Request. — By failing to respond to plaintiff's request for admissions, defendants allowed the facts in question to be judicially established. Town of Chapel Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

Quoted in Eury v. North Carolina Emp. Sec. Comm'n, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994).

Cited in McKinney v. Avery Journal, Inc., 99 N.C. App. 529, 393 S.E.2d 295 (1990).

Rule 37. Failure to make discovery; sanctions.

Legal Periodicals. —
For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

CASE NOTES

Information Irrelevant for Discovery Purposes. — Whether or not plaintiff's replacement had a relationship with a high school student during his previous employment, the complete student records at high school and school personnel records were irrelevant to whether defendants intentionally inflicted emotional distress on plaintiff, constructively and wrongfully discharged her, or maliciously interfered with her contract; therefore, the trial court did not abuse its discretion in denying motion to compel discovery. Wagoner v. Elkin City Schs. Bd. of Educ., 113 N.C. App. 579, 440 S.E.2d 119, cert. denied, 336 N.C. 615, 447 S.E.2d 414 (1994).

Responding Party May Not Unilaterally Interpret Relevant Scope. — The responding party may not unilaterally "interpret" the relevant scope of its response and only provide that information it considers discoverable. Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990).

The trial judge has broad discretion, etc. —
The choice of sanctions under Rule 37 is within the trial court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion. Brooks v. Giesey, 106 N.C. App. 586, 418 S.E.2d 236 (1992), aff'd, 334 N.C. 303, 432 S.E.2d 339 (1993).

A trial court must consider less severe sanctions before dismissing a plaintiff's complaint under subsection (d) of this rule. Goss v. Battle, 111 N.C. App. 173, 432 S.E.2d 156 (1993).

Sanctions Imposed on Attorney. — Trial court was justified in imposing sanctions on attorney where notice of plaintiff's deposition was actually sent to her office, and court of appeals could only assume that plaintiff was unaware that she needed to bring any documents with her because her counsel never informed her of such. Pugh v. Pugh, 113 N.C. App. 375, 438 S.E.2d 214 (1994).

The proximity of the discovery abuse to the date of trial is one factor the trial court may consider when determining whether or not to award sanctions. Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990).

Party Not Precluded from Presenting Witnesses and Exhibits at

Trial. — Where plaintiff, in a deposition, specifically requested from the defendant the names of his trial witnesses and a list of his trial exhibits, but made no showing that he had a special need for defendant's list of witnesses and exhibits ten months prior to trial, the information sought was not discoverable and defendant's failure to provide such information could not preclude him from presenting witnesses and exhibits at the trial. King v. Koucouliotes, 108 N.C. App. 751, 425 S.E.2d 462, cert. granted, 334 N.C. 163, 432 S.E.2d 361, discretionary review improvidently granted, 335 N.C. 164, 436 S.E.2d 132 (1993).

Movant Need Not Show Prejudice to Obtain Sanctions. — This rule does not require the movant to show that it was prejudiced by the nonmovant's actions in order to obtain sanctions for abuse of discovery. Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990).

Default Judgment. — Under this rule, where an answer to the complaint has been filed, and a party fails to answer requested discovery, the opposing party may move the court to order the answer stricken, and if granted, for entry of default judgment against the disobedient party. O'Neal v. Murray, 105 N.C. App. 102, 411 S.E.2d 628 (1992).

Rule Inapplicable to Requests for Protective Order. — This rule was inapplicable to plaintiff's request for sanctions because plaintiff did not compel discovery, but instead sought to prevent discovery by asking for a protective order. Wachovia Bank v. Bob Dunn Jaguar, Inc., 117 N.C. App. 165, 450 S.E.2d 527 (1994).

Prohibiting Introduction of Evidence as Sanction. — The sanction provision of this rule permits the court to make such orders as are "just" upon a party's failure to obey an order to provide or permit discovery, including refusing to permit the disobedient party to introduce the matters in question into evidence. Bumgarner v. Reneau, 332 N.C. 624, 422 S.E.2d 686 (1992).

Sanction Overturned Only for, etc. —

Although the sanctions imposed were severe, they are among those expressly authorized by statute; absent specific evidence of injustice, the court of appeals could not hold they constitute an abuse of discretion. Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990).

Applied in Jennings v. Jessen, 103 N.C. App. 739, 407 S.E.2d 264 (1991); Smitheman ex rel. Godwin v. National Presto Indus., Inc., 109 N.C. App. 636, 428 S.E.2d 465 (1993).

Quoted in In re Vestal, 104 N.C. App. 739, 411 S.E.2d 167 (1991).

Cited in Kirkhart v. Saieed, 107 N.C. App. 293, 419 S.E.2d 580 (1992); North Carolina Farm Bureau Mut. Ins. Co. v. Wingler, 110 N.C. App. 397, 429 S.E.2d 759 (1993); Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

ARTICLE 6.

Trials.

Rule 38. Jury trial of right.

CASE NOTES

A party may waive his right to jury trial, etc. —

Where defendant first requested a jury trial almost eleven months after he served his answer, the last pleading filed in the case, defendant's failure to timely demand a jury trial constituted a waiver by him of jury trial of right. Whitfield v. Todd, 116 N.C. App. 335, 447 S.E.2d 796, cert. denied, 338 N.C. 524, 453 S.E.2d 170 (1994).

Stated in Wachovia Bank & Trust Co. v. Templeton Oldsmobile-Cadillac-Pontiac, Inc., 109 N.C. App. 352, 427 S.E.2d 629 (1993).

Cited in Delta Marine, Inc. v. Whaley, 813 F. Supp. 414 (E.D.N.C. 1993).

Rule 39. Trial by jury or by the court.

(a) *By jury.* — When trial by jury has been demanded and has not been withdrawn as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless

(1) The parties who have pleaded or otherwise appeared in the action or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the minutes, consent to trial by the court sitting without a jury, or

(2) The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes.

(b) *By the court.* — Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a trial by jury in an action in which such a demand might have been made of right, the court in its discretion upon motion or of its own initiative may order a trial by jury of any or all issues.

(c) *Advisory jury and trial by consent.* — In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue or question of fact with an advisory jury or the court, with the consent of the parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right. In either event the jury shall be selected in the manner provided by Rule 47(a). (1967, c. 954, s. 1.)

Editor's Note. —
This section is set out in the supplement to correct an error in the main pamphlet.

Rule 40. Assignment of cases for trial; continuances.

CASE NOTES

I. In General.
II. Calendaring of Actions.

I. IN GENERAL.

Applied in Alexander v. Wilkerson, 99 N.C. App. 340, 392 S.E.2d 765 (1990).

Stated in Broome v. Broome, 112 N.C. App. 823, 436 S.E.2d 918 (1993).

II. CALENDARING OF ACTIONS.

The senior Superior Court judge "may provide by rule for the calendaring of actions for trial in the superior court division . . .". Lomax v. Shaw, 101 N.C. App. 560, 400 S.E.2d 97 (1991).

The superior court judge was well within the bounds of the court's inherent authority to manage the case docket when he struck defendant's answer as a sanction for willful failure to execute agreed settlement because defendants offered no plausible excuse as to why they did not execute the two paragraph consent judgment, saying only that they did not understand it and in addition judge gave notice that failure to file the consent order would result in the imposition of sanctions. Lomax v. Shaw, 101 N.C. App. 560, 400 S.E.2d 97 (1991).

Rule 41. Dismissal of actions.

CASE NOTES

I. In General.
II. Voluntary Dismissal.
III. Involuntary Dismissal.
  A. In General.
  B. Failure to Prosecute or to Comply with Rules or Orders.
  C. Failure to Show Right to Relief.
IV. Costs.

I. IN GENERAL.

Dismissal Order Binding on Defendant. — Because defendant did not appeal the trial court's dismissal order which allowed plaintiff an additional year in which to refile, he was bound by that order and he could not attack the trial court's dismissal order collaterally by appealing the final judgment entered after plaintiff refiled. Jones v. Summers, 117 N.C. App. 415, 450 S.E.2d 920 (1994).

Requirement of Detailed Findings. — The requirement of appropriately detailed findings is designed to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system. Mashburn v. First Investors Corp., 102 N.C. App. 560, 402 S.E.2d 860 (1991).

Applied in Myers v. Barringer, 101 N.C. App. 168, 398 S.E.2d 615 (1990); Lutz v. Lutz, 101 N.C. App. 298, 399 S.E.2d 385 (1991); Woodard v. North Carolina Local Governmental Employees' Retirement Sys., 108 N.C. App. 378, 424 S.E.2d 431 (1993); Thompson v. Hank's of Carolina, Inc., 109 N.C. App. 89, 426 S.E.2d 278 (1993); In re Becker, 111 N.C. App. 85, 431 S.E.2d 820 (1993); Moore v. Pate, 112 N.C. App. 833, 437 S.E.2d 1 (1993).

Quoted in Kirby Bldg. Sys. v. McNiel, 327 N.C. 234, 393 S.E.2d 827 (1990); Marlowe v. Clark, 112 N.C. App. 181, 435 S.E.2d 354 (1993).

Cited in Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990); Estridge v. Ford Motor Co., 101 N.C. App. 716, 401 S.E.2d 85 (1991); Furr v. Noland, 103 N.C. App. 279, 404 S.E.2d 885 (1991); Hull v. Oldham, 104 N.C. App. 29, 407 S.E.2d 611 (1991); Brockwell v. Lake Gaston Sales & Serv., 105 N.C. App. 226, 412 S.E.2d 104 (1992); Hoots v. Pryor, 106 N.C. App. 397, 417 S.E.2d 269 (1992); Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992); Brandenburg Land Co. v. Champion Int'l Corp., 107 N.C. App. 102, 418 S.E.2d 526 (1992); Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420 (1993); Pieper v. Pieper, 108 N.C. App. 722, 425 S.E.2d 435 (1993); Lowry v. Duke Univ. Medical Ctr., 109 N.C. App. 83, 425 S.E.2d 739 (1993); Bockweg v. Anderson, 333 N.C. 486, 428 S.E.2d 157 (1993); Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993); Goss v. Battle, 111 N.C. App. 173, 432 S.E.2d 156 (1993); Gunter v. Anders, 114 N.C. App. 61, 441 S.E.2d 167; Stegall v. Stegall, 336 N.C. 473, 444 S.E.2d 177 (1994); Wiggins v. Triesler Co., 115 N.C. App. 368, 444 S.E.2d 245 (1994); Nichols v. Wilson, 16 N.C. App. 286, 448 S.E.2d 119, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994); Democratic Party v. Guilford County Bd. of Elec., 117 N.C. App. 633, 453 S.E.2d 243 (1995); Shamley v. Shamley, 117 N.C. App. 175, 455 S.E.2d 435 (1994).

II. VOLUNTARY DISMISSAL.

How Filing Requirements of Subdivision (a)(1)(i) May Be Met. — No means other than oral notice in open court have been allowed to substitute for the filing requirements of subdivision (a)(1)(i) of this rule. Johnson v. Hutchens, 103 N.C. App. 384, 405 S.E.2d 597 (1991).

Contact with defendant's attorney by telephone or mail concerning voluntary dismissal does not satisfy the filing requirements of subdivision (a)(1)(i) of this rule. Johnson v. Hutchens, 103 N.C. App. 384, 405 S.E.2d 597 (1991).

A plaintiff is free to abandon an alleged or potential claim against another party at any time. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Under subdivision (a)(1) of this rule, plaintiff may voluntarily dismiss his suit, without order of the court, by filing a notice of dismissal at any time before resting his case. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

The two-dismissal rule applies only when the plaintiff has twice dismissed an action based on or including the same claim, and, as plaintiffs dismissed their first action only once, the two-dismissal rule did not apply; plaintiffs' voluntary dismissal of their own claim against one defendant did not constitute an adjudication on the merits pursuant to subdivision (a)(1) and plaintiffs were not barred from bringing action for crop damage. Hopkins v. Ciba-Geigy Corp., 111 N.C. App. 179, 432 S.E.2d 142 (1993).

A voluntary dismissal is effective whether or not a court has jurisdiction. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

No Court Action Required. —

A notice of dismissal pursuant to subdivision (a)(1) of this section is an action taken by the plaintiff ending the suit, and no action of the court is necessary to give the notice its full effect. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Amendment Pursuant to § 1A-1, Rule 60(b). — A voluntary dismissal under subsection (a)(1) of this rule can be amended pursuant to § 1A-1, Rule 60(b). Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc., 333 N.C. 250, 424 S.E.2d 383 (1993).

Dismissal after Entry of Final Order Ineffective. — Purported voluntary dismissal of petition for attorney's fees was of no legal efficacy where it came after the clerk entered a final order on the petition. In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. dismissed, 331 N.C. 748, 417 S.E.2d 236 (1992).

This rule provides that dismissal is without prejudice, unless otherwise stated, allowing plaintiff to commence a new action based on the same claim within one year. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Where plaintiff's first voluntarily-dismissed suit, etc. —

A voluntary dismissal of negligence action without prejudice did not toll the statute of limitations in a case in which the plaintiff, seeing the statute of limitations about to run, received an order extending the time for filing a complaint but failed to serve defendant with civil summons and the order. The defective service of process discontinued plaintiff's original action, and the trial court properly treated the voluntary dismissal as if it had never been filed and the statute of limitations as if it had not been tolled. Latham v. Cherry, 111 N.C. App. 871, 433 S.E.2d 478 (1993), cert. denied, 335 N.C. 556, 441 S.E.2d 116 (1994).

"Second dismissal" rule does not make voluntary dismissals by stipulation or order of court, etc. —

The "second dismissal" rule does not apply to make voluntary dismissals by stipulation or by order of court "on the merits," even when they follow a previously filed notice of voluntary dismissal. North Carolina R.R. v. Ferguson Bldrs. Supply, 103 N.C. App. 768, 407 S.E.2d 296 (1991).

Second Complaint Not Barred by Statute of Limitations. — Where there was no evidence of record that plaintiff's sole intent in filing the first complaint was to dismiss it in order to gain another year in which to file a "sufficient" complaint, plaintiff waited over two months to dismiss his original complaint and there was no judicial admission that plaintiff filed and dismissed his first complaint in bad faith, the "savings" provision of subdivision (a)(1) properly applied to plaintiff's complaint so that his second complaint was not barred by the statute of limitations. Hawkins v. State, 117 N.C. App. 615, 453 S.E.2d 233 (1995).

Voluntary Dismissal as Final Adjudication. — Once the one-year period for refiling an action has elapsed and the action can no longer be resurrected, the voluntary dismissal acts as a final adjudication for purposes of § 1A-1, Rule 60(b). Robinson v. General Mills Restaurants, Inc., 110 N.C. App. 633, 430 S.E.2d 696, cert. granted, 334 N.C. 623, 435 S.E.2d 340, 341 (1993).

When One-Year Period Begins to Run. —

When a trial court instructs, or expressly permits, a plaintiff who has given oral notice of voluntary dismissal pursuant to subsection (a)(1) of this rule to file written notice to the same effect at a later date during the session of court at which oral notice was given, and plaintiff files written notice accordingly, the one-year period for refiling provided by the rule begins to run when written notice is filed. Thompson v. Newman, 331 N.C. 709, 417 S.E.2d 224 (1992).

Lien May Not Be Cancelled. — In light of the requirement of § 44A-16(4) that a judgment must be filed to discharge a lien, a lien may not be cancelled by taking a voluntary dismissal without prejudice. Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc., 333 N.C. 250, 424 S.E.2d 383 (1993).

A party may refile an action to perfect a lien after taking a voluntary dismissal without prejudice pursuant to subsection (a)(1) of this rule. Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc., 333 N.C. 250, 424 S.E.2d 383 (1993).

Equitable Distribution Claim. — Where defendant sets up a claim for affirmative relief against a plaintiff arising out of the same transactions alleged by the plaintiff, plaintiff cannot take a voluntary dismissal without the consent of the defendant; however, plaintiff's original claim may be barred by law if the court finds that separation agreements fully disposed of the parties' rights arising out of the marriage, and thus bar an equitable distribution claim. Rabon v. Rabon, 102 N.C. App. 452, 402 S.E.2d 461 (1991).

Trial court did not have authority to reaffirm divorce decree and reserve for future resolution the issue of equitable distribution; since the trial court did not set aside the divorce but rather attempted to nullify the consequences of defendant's failure to assert her claim for equitable distribution prior to the entry of judgment of divorce, the order failed; even if the court effectively set aside, briefly, the divorce decree itself and then immediately reinstated the divorce decree with a reservation of an equitable distribution claim, the reservation of the equitable distribution claim would be a legal nullity because plaintiff voluntarily dismissed his equitable distribution claim and defendant did not, during the time the divorce was arguably set aside, file an answer, counterclaim or separate action requesting equitable distribution. Carter v. Carter, 102 N.C. App. 440, 402 S.E.2d 469 (1991).

Where at the time the plaintiff filed his voluntary dismissal of his claim for equitable distribution, the defendant had filed no pleadings, plaintiff was free to enter his voluntary dismissal of his equitable distribution claim without any notice to the defendant or the defendant's consent. Carter v. Carter, 102 N.C. App. 440, 402 S.E.2d 469 (1991).

Attorneys' Fees. — Where the plaintiffs filed a voluntary dismissal with prejudice pursuant to this rule, the trial court was not deprived of jurisdiction to determine the appropriateness of attorney fees under § 1A-1, Rule 11 or § 6-21.5. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Collateral Issues. — Attorneys' fee requests under § 1A-1, Rule 11 raise collateral issues which often require consideration by the trial court after the action has been terminated, and a voluntary dismissal under this rule does not deprive the trial court of jurisdiction to determine these collateral issues. Higgins v. Patton, 102 N.C. App. 301, 401 S.E.2d 854 (1991), overruled on other grounds, Bryson v. Sullivan, 330 N.C. 644, 412 S.E.2d 327 (1992).

Attorneys' fee requests under § 1A-1, Rule 11 and § 6-21.5 raise collateral issues which often require consideration by the trial court after the action has been terminated, and a voluntary dismissal under this rule does not deprive the trial court of jurisdiction to determine these collateral issues. To hold otherwise would allow a litigant or attorney to "purge his violation of § 1A-1, Rule 11 or § 6-211.5 merely by taking a dismissal, and thereby lose all incentive to stop, think and investigate more carefully before serving and filing papers." Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Rescission Offer. — Judgment that simply made the bare conclusion that an investment firm tendered a "valid" rescission offer and that, therefore, the investor was barred from bringing suit under the provisions of subdivision (g)(1) of § 78A-56 did not rise to the level of separate findings of fact and conclusions of law; the judgment, therefore, did not comport with the requirements of this rule and § 1A-1, Rule 52(a). Mashburn v. First Investors Corp., 102 N.C. App. 560, 402 S.E.2d 860 (1991).

Court Costs. — Where plaintiff takes a voluntary dismissal pursuant to this rule, no suit is pending thereafter on which the court could make a final order. However, the trial court retains authority to apportion and tax court costs. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Savings Provision. — The one-year savings provision of subdivision (a)(1) of this rule applies when plaintiffs and defendants stipulate to a voluntary dismissal without prejudice of an action in a federal district court sitting in North Carolina and plaintiffs file the same action within the one-year period in a North Carolina state court. Bockweg v. Anderson, 328 N.C. 436, 402 S.E.2d 627 (1991).

III. INVOLUNTARY DISMISSAL.

A. In General.

Involuntary Dismissal May Be Used to Sanction, etc. —

Under subsection (b) of this rule, a trial court may enter sanctions for failure to prosecute only where the plaintiff or his attorney "manifests and intention to thwart the progress of the action to its conclusion" or "fails to progress the action towards its conclusion" by engaging in some delaying tactic. Whether a plaintiff or his attorney has manifested an intent to thwart the progress of an action or has engaged in some delaying tactic may be inferred from the facts surrounding the delay in the prosecution of the case. The sanctions may be entered against either the represented party or the attorney, even when the attorney is solely responsible for the delay or violation. Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992).

Although a dismissal with prejudice pursuant to subsection (b) is available as a sanction for a violation of subdivision (a)(2), it is not the only available sanction and should be imposed only where the trial court determines that less drastic sanctions are insufficient. McLean v. Mechanic, 116 N.C. App. 271, 447 S.E.2d 459 (1994), review denied, 339 N.C. 738, 454 S.E.2d 654, cert. denied, 339 N.C. 738, 454 S.E.2d 653 (1995).

Function of Judge. —

In accord with first paragraph in the main volume. See C.F.R. Foods, Inc. v. Randolph Dev. Co., 107 N.C. App. 584, 421 S.E.2d 386, cert. denied, 333 N.C. 166, 424 S.E.2d 906 (1992).

In accord with second paragraph in the main volume. See C.F.R. Foods, Inc. v. Randolph Dev. Co., 107 N.C. App. 584, 421 S.E.2d 386, cert. denied, 333 N.C. 166, 424 S.E.2d 906 (1992).

There is no exception under section (b), etc. —

The savings provision of subsection (b) did not apply to allow plaintiff an additional year to file in state court when the federal court order dismissing his action did not specify additional time within which to file. Clark v. Velsicol Chem. Corp., 110 N.C. App. 803, 431 S.E.2d 227, cert. granted, 334 N.C. 687, 436 S.E.2d 371 (1993), aff'd per curiam, 336 N.C. 599, 444 S.E.2d 223 (1994).

Petition for Certiorari. — Commencing an action in federal court did not toll negligence statute of limitation and did not keep it tolled until the United States Supreme Court ruled on a petition for certiorari to review an involuntary dismissal of that federal action. Clark v. Velsicol Chem. Corp., 110 N.C. App. 803, 431 S.E.2d 227, cert. granted, 334 N.C. 687, 436 S.E.2d 371 (1993), aff'd per curiam, 336 N.C. 599, 444 S.E.2d 223 (1994).

B. Failure to Prosecute or to Comply with Rules or Orders.

Dismissal for Failure to Prosecute Held Error. — Where nothing in the record indicated that the plaintiffs failed to assist or cooperate with their attorneys or that they were not diligent in prosecuting their action, the entry of sanctions against either the plaintiffs or their attorney could not be upheld on the ground of the plaintiffs' failure to prosecute. Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992).

The trial court did not abuse its discretion, etc. —

Where trial court found that corporate officer's failure to account made it impossible for receivers to defend against claims of that officer and his wife against the corporation in liquidation, trial court was authorized, pursuant to section (b) of this rule, to dismiss the claims of the officer and his wife on their receivership in the event that the corporate officer failed to provide an accounting within 30 days of the effective date of the court's order. Lowder v. All Star Mills, Inc., 103 N.C. App. 479, 405 S.E.2d 794 (1991).

C. Failure to Show Right to Relief.

Defendant's Motion Challenges Sufficiency of Plaintiff's Evidence. —

A defendant in an action being tried without a jury may test the sufficiency of the plaintiff's evidence by moving at the close of plaintiff's evidence for involuntary dismissal under subsection (b) of this rule on the ground that upon the facts and the law the plaintiff has shown no right to relief. United Carolina Bank v. First Union Nat'l Bank, 109 N.C. App. 201, 426 S.E.2d 462 (1993).

Deference to Be Accorded to Court's Judgment. — In the context of an involuntary dismissal, the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary. The trial court's judgment must be granted the same deference as a jury verdict. Carter v. Foster, 103 N.C. App. 110, 404 S.E.2d 484 (1991).

When Involuntary Dismissal Should Be Granted. —

In accord with the main volume. See Carter v. Foster, 103 N.C. App. 110, 404 S.E.2d 484 (1991).

Dismissal Properly Denied. — In an action for breach of express and implied warranties and damages arising out of plaintiff's purchase of an automobile from defendant, it was undisputed that defendant informed plaintiffs of a warranty and that the car suffered from several defects. Plaintiffs attempted to have the car repaired within the warranty period, but to no avail. Based on these facts and other evidence, it would have been improper for the trial court to find that plaintiffs had shown "no right to relief" for their breach of warranty claims; therefore, the trial court properly denied defendant's motion to dismiss. Riley v. Ken Wilson Ford, Inc., 109 N.C. App. 163, 426 S.E.2d 717 (1993).

Remedy Held Unavailable. — In a case not tried by a jury, though the judge's determination that plaintiff was contributorily negligent as a matter of law was error, it was not reversible error. The transcript indicated that the judge made a factual finding from the evidence that plaintiff was contributorily negligent, a finding clearly supported by competent evidence. If the case had been tried to a jury and dismissed before the jury considered it, a new trial would have had to be ordered, but ordering a new trial before a fact-finder who has permissibly found that plaintiff was contributorily negligent and could not prevail in her action would avail her nothing. Church v. Greene, 100 N.C. App. 675, 397 S.E.2d 649 (1990).

IV. COSTS.

Costs from Earlier Action. — A trial court, in one action, can tax costs incurred in an earlier action that was voluntarily dismissed. Sealey v. Grine, 115 N.C. App. 343, 444 S.E.2d 632 (1994).

Deposition Expenses. —

"Costs" also includes "deposition expenses," unless the depositions were unnecessary, even though an award of deposition expenses is not expressly allowed by statute. Sealey v. Grine, 115 N.C. App. 343, 444 S.E.2d 632 (1994).

Rule 42. Consolidation; separate trials.

CASE NOTES

I. In General.
III. Separate Trials.

I. IN GENERAL.

Cited in Crump v. Board of Educ., 107 N.C. App. 375, 420 S.E.2d 462 (1992); Cagle v. Teachy, 111 N.C. App. 244, 431 S.E.2d 801 (1993); Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

III. SEPARATE TRIALS.

Separation Held Proper. — Claim against one of several defendants arose from circumstances totally different from those that gave rise to the other claims involved and trying that issue separately was a comparatively simple process that had the advantage of possibly making it unnecessary to try the other issues; therefore, severance of that claim was proper. Hoots v. Toms & Bazzle, 100 N.C. App. 412, 396 S.E.2d 820 (1990).

No Error Where Sound Grounds for Separation Exist. — Since subsection (b) of this rule authorizes the trial judge to order a separate trial of any claim or issue "in furtherance of convenience or to avoid prejudice," the severance of the claim against one of several defendants was within the court's discretion, and was not error since sound grounds therefor existed. Hoots v. Toms & Bazzle, 100 N.C. App. 412, 396 S.E.2d 820 (1990).

Rule 43. Evidence.

CASE NOTES

I. In General.
III. Examination of Hostile Witnesses and Adverse Parties.

I. IN GENERAL.

Stated in Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

III. EXAMINATION OF HOSTILE WITNESSES AND ADVERSE PARTIES.

Termination of Parental Rights. — A respondent in a proceeding to terminate her parental rights is a party to the proceeding, and may be called to testify as an adverse party when she appeared at the proceeding, and a subpoena was not required. In re Davis, 116 N.C. App. 409, 448 S.E.2d 303 (1994).

Rule 44. Proof of official record.

CASE NOTES

Presumption of Validity. — Once a judgment creditor was entitled to a presumption that an out of state judgment was entitled to full faith and credit, the plaintiff was not required to bring forth evidence that none of the defenses available to defendants were valid; rather the defendants were required to bring forth evidence to rebut the presumption of validity, and, as the defendants offered no such evidence, the trial court correctly ordered that the plaintiff's motion to enforce the judgment be allowed and ordered that the out of state judgment be given full faith and credit. Lust v. Fountain of Life, Inc., 110 N.C. App. 298, 429 S.E.2d 435 (1993).

Rule 44.1. Determination of foreign law.

A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or by other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Chapter 8 of the General Statutes and State law. The court's determination shall be treated as a ruling on a question of law. (1995, c. 389, s. 5.)

Editor's Note. — Session Laws 1995, c. 389, s. 6, provides that this rule is effective October 1, 1995, and applicable to civil actions filed on or after that date.

Rule 46. Objections and exceptions.

CASE NOTES

I. In General.

I. IN GENERAL.

Preserving Matters Underlying a Motion in Limine. — It is not sufficient to simply file a pretrial motion in limine to exclude evidence which the trial judge has not heard; to preserve for appeal matters underlying a motion in limine, the movant must make at least general objection when the evidence is offered at trial. Beaver v. Hampton, 106 N.C. App. 172, 416 S.E.2d 8 (1992), rev'd in part and aff'd in part, 333 N.C. 455, 427 S.E.2d 317 (1993).

Failure to Object to Discussion Between Court and Jurors. — Plaintiff who did not object or otherwise voice a concern during a discussion between the court and jurors regarding court's procedure for correcting jury's failure to deliberate on the issues, failed to preserve an exception to that procedure. Tin Originals, Inc. v. Colonial Tin Works, Inc., 98 N.C. App. 663, 391 S.E.2d 831 (1990).

Applied in Badgett v. Davis, 104 N.C. App. 760, 411 S.E.2d 200 (1991); State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992).

Rule 49. Verdicts.

CASE NOTES

I. In General.

I. IN GENERAL.

Form and number of issues, etc. — The form and number of issues to be submitted is a matter which rests in the sound discretion of the trial judge, assuming that the issue is raised by the pleadings, liberally construed. Lenins v. K-Mart Corp., 98 N.C. App. 590, 391 S.E.2d 843 (1990).

Applied in Stimpson Hosiery Mills, Inc. v. Pam Trading Corp., 98 N.C. App. 543, 392 S.E.2d 128 (1990).

Cited in Cagle v. Teachy, 111 N.C. App. 244, 431 S.E.2d 801 (1993).

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

CASE NOTES

- I. In General.
- II. Directed Verdict.
  - A. In General.
  - B. Statement of Specific Grounds.
- III. Judgment Notwithstanding the Verdict and New Trial.

I. IN GENERAL.

When Motions Granted. — A defendant is not entitled to a directed verdict or a judgment notwithstanding the verdict unless the evidence, viewed in the light most favorable to the plaintiff, establishes its defense as a matter of law. Goodwin v. Investors Life Ins. Co. of N. Am., 332 N.C. 326, 419 S.E.2d 766 (1992).

Attorneys' Fees. — Section 6-21.5 provides in part that the entry of judgment pursuant to this rule or § 1A-1, Rule 56 may be some evidence that an attorneys' fee may be warranted. The statute's reference to these rules, which are applicable only if evidence in addition to the pleadings is before the court, thus implies that when deciding whether to grant a motion under § 6-21.5 the trial court may consider evidence developed after the pleadings have been filed. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Applied in Hazelwood v. Landmark Bldrs., Inc., 100 N.C. App. 386, 396 S.E.2d 342 (1990); Tin Originals, Inc. v. Colonial Tin Works, Inc., 98 N.C. App. 663, 391 S.E.2d 831 (1990); Hill v. Winn-Dixie Charlotte, Inc., 100 N.C. App. 518, 397 S.E.2d 347 (1990); Abernethy v. Spartan Food Sys., 103 N.C. App. 154, 404 S.E.2d 710 (1991); Boone Lumber, Inc. v. Sigmon, 103 N.C. App. 798, 407 S.E.2d 291 (1991); Wilson v. Pearce, 105 N.C. App. 107, 412 S.E.2d 148 (1992); Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992); Maintenance Equip. Co. v. Godley Bldrs., 107 N.C. App. 343, 420 S.E.2d 199 (1992); Phillips ex rel. Schultz v. Holland, 107 N.C. App. 688, 421 S.E.2d 608 (1992); Mabry v. Nationwide Mut. Fire Ins. Co., 108 N.C. App. 37, 422 S.E.2d 322 (1992); Munie v. Tangle Oaks Corp., 109 N.C. App. 336, 427 S.E.2d 149 (1993); Harrison v. Edison Bros. Apparel Stores, 814 F. Supp. 457 (M.D.N.C. 1993); Phillips v. Winston-Salem/Forsyth County Bd. of Educ., 117 N.C. App. 274, 450 S.E.2d 753 (1994).

Quoted in Schwartzback v. Apple Baking Co., 109 N.C. App. 216, 426 S.E.2d 438 (1993); Ace Chem. Corp. v. DSI Transps., Inc., 115 N.C. App. 237, 446 S.E.2d 100 (1994).

Stated in Peal ex rel. Peal v. Smith, 115 N.C. App. 225, 444 S.E.2d 673 (1994).

Cited in Marina Food Assocs. v. Marina Restaurant, Inc., 100 N.C. App. 82, 394 S.E.2d 824 (1990); Parrish Funeral Home v. Pittman, 104 N.C. App. 268, 409 S.E.2d 327 (1991); Olvera v. Charles Z. Flack Agency, Inc., 106 N.C. App. 193, 415 S.E.2d 760 (1992); Ace, Inc. v. Maynard, 108 N.C. App. 241, 423 S.E.2d 504 (1992); B.B. Walker Co. v. Burns Int'l Sec. Serv., Inc., 108 N.C. App. 562, 424 S.E.2d 172 (1993); McDonald v. Medford, 111 N.C. App. 643, 433 S.E.2d 231 (1993); Abels v. Renfro Corp., 335 N.C. 209, 436 S.E.2d 822 (1993); Tate v. Christy, 114 N.C. App. 45, 440 S.E.2d 858 (1994); Sheppard v. Zep Mfg. Co., 114 N.C. App. 25, 441 S.E.2d 161 (1994); Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994); Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994); Nichols v. Wilson, 16 N.C. App. 286, 448 S.E.2d 119, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994); Green v. Rouse, 116 N.C. App. 647, 448 S.E.2d 846 (1994); Raintree Homeowners Ass'n v. Bleimann, 116 N.C. App. 561, 449 S.E.2d 13, cert. granted, 338 N.C. 669, 453 S.E.2d 180 (1994).

II. DIRECTED VERDICT.

A. In General.

Plaintiff must make out his case by proving the facts essential to his cause of action or by proving facts permitting an inference of the material facts as a fair and logical conclusion. Southern Bell Tel. & Tel. Co. v. West, 100 N.C. App. 668, 397 S.E.2d 765 (1990), aff'd, 328 N.C. 566, 402 S.E.2d 409 (1991).

Degree of Probability Must Exist with Issue of Causation. — Some degree of probability, however small, must exist to provide the jury with a question of causation to resolve, not just mere possibility. Hinson v. National Starch & Chem. Corp., 99 N.C. App. 198, 392 S.E.2d 657 (1990).

As Considered in the Light Most Favorable to Nonmovant. —

On a defendant's motion for a directed verdict, plaintiff's evidence must be taken as true and all the evidence must be considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom. Atlantic Tobacco Co. v. Honeycutt, 101 N.C. App. 160, 398 S.E.2d 641 (1990), discretionary review denied, 328 N.C. 569, 403 S.E.2d 506 (1991).

If There Is More Than a Scintilla of Evidence, Motion Should Be Denied. —

More than a scintilla of evidence existed from which the jury could find that defendant's trespass was accompanied by a reckless disregard for plaintiffs' rights and an element of intent after defendant discovered he had trespassed on plaintiffs' property and continued to trespass; therefore, the trial court properly denied defendant's motions for directed verdict and judgment notwithstanding the verdict on the issue of punitive damages. Lee v. Bir, 116 N.C. App. 584, 449 S.E.2d 34 (1994), cert. denied, 340 N.C. 113, 454 S.E.2d 652 (1995).

Objections Not Equivalent to Directed Verdict. — Plaintiff's objections to the issue of contributory negligence made at the conference on the jury instructions were not the equivalent of a motion for directed verdict made pursuant to subdivision (a) of this rule, as plaintiff could have made a proper motion at the close of evidence and plaintiff's objection during the jury instruction conference would not allow defendant a proper chance to correct any errors in its proof of contributory negligence. Thus, the trial court erred in holding that plaintiff's objection to the contributory negligence issue was the equivalent of a directed verdict. Enns v. Zayre Corp., 116 N.C. App. 687, 449 S.E.2d 478 (1994), cert. denied, — N.C. —, 454 S.E.2d 649 (1995).

Contributory Negligence Should Have Been a Jury Question. — Where evidence did not establish plaintiff's contributory negligence as a matter of law, that issue should have been resolved by the jury, and the directed verdict in favor of defendant was reversed. Crane v. Caldwell, 113 N.C. App. 362, 438 S.E.2d 449 (1994).

Appellate Review of Motion. — Because defendant failed to assert the insufficiency of the evidence to support plaintiffs' action for trespass or an award of actual damages as grounds for his motion for a directed verdict, defendant waived his right to appellate review of these issues. Lee v. Bir, 116 N.C. App. 584, 449 S.E.2d 34 (1994), cert. denied, 340 N.C. 113, 454 S.E.2d 652 (1995).

Affirmative Defenses. — Where a defendant establishes an affirmative defense as a matter of law, there are no issues to submit to a jury and a plaintiff has no right to recover. Directing a verdict for the defendant in such instance is appropriate. Goodwin v. Investors Life Ins. Co. of N. Am., 332 N.C. 326, 419 S.E.2d 766 (1992).

It is rarely appropriate to grant a directed verdict for a party bearing the burden of proof. Looney v. Community Bible Holiness Church, 103 N.C. App. 469, 405 S.E.2d 811 (1991).

Directed Verdict Not Necessarily Prevented by Prima Facie Case. — Nonmoving party's establishment of a prima facie case did not necessarily prevent the granting of a directed verdict in the moving party's favor. Goodwin v. Investors Life Ins. Co. of N. Am., 332 N.C. 326, 419 S.E.2d 766 (1992).

Directed Verdict Granted Despite Establishment of Prima Facie Case. — Where insurer showed that the insured made representations which were material and false and, by so doing, fully overcame plaintiff's prima facie case, insurer was entitled to a directed verdict as a matter of law. Goodwin v. Investors Life Ins. Co. of N. Am., 332 N.C. 326, 419 S.E.2d 766 (1992).

Determination of Validity of Will. — Where appropriate, a trial court may direct a verdict for propounders of a will in a caveat proceeding at the close of all evidence. In re Will of Jarvis, 107 N.C. App. 34, 418 S.E.2d 520 (1992), aff'd in part, rev'd in part, 334 N.C. 140, 430 S.E.2d 922 (1993).

Directed Verdict When, etc. —

A directed verdict on the ground of contributory negligence should be granted only when this defense is so clearly established that no other reasonable inference can be drawn from the evidence. Williams v. Hall, 100 N.C. App. 655, 397 S.E.2d 767 (1990).

When a defendant pleads as a defense the plaintiff's contributory negligence, the defendant has the burden of proof on the issue, and if the defendant offers no evidence, a directed verdict for the defendant based on plaintiff's contributory negligence is appropriate only when there are no genuine issues of fact, and the non-movant's contributory negligence is so clearly established that no other reasonable inference or conclusion may be drawn therefrom. Price v. Jack Eckerd Corp., 100 N.C. App. 732, 398 S.E.2d 49 (1990).

Directed verdict on issue of contributory negligence was improper where the plaintiff testified that he was not completely blinded by the oncoming headlights as he approached the tractor-trailer, the plaintiff could see much more than the edge of the road, and the plaintiff may have been keeping a proper lookout without realizing that he was partially blinded only as to the area beyond the tractor-trailer's headlights. In such a deceptive visual situation, the plaintiff may not have been knowingly driving into a blinded area, for it would have appeared as though he could see into the distant darkness. From the evidence there was insufficient evidence to establish that plaintiff was contributorily negligent as a matter of law. Williams v. Hall, 100 N.C. App. 655, 397 S.E.2d 767 (1990).

Failure to Show One Cause of Damages More Likely than Others. — Directed verdict was proper where plaintiff did not offer any testimony suggesting that one cause of his damages was more likely than the others. Such testimony as to causation, being speculative in nature, would have resulted in a verdict founded upon a series of mere possibilities; and reliance upon a choice of possibilities amounts to nothing more than guesswork. Southern Bell Tel. & Tel. Co. v. West, 100 N.C. App. 668, 397 S.E.2d 765 (1990).

Denial of Directed Verdict. — If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict should be denied. Snead v. Holloman, 101 N.C. App. 462, 400 S.E.2d 91 (1991).

A directed verdict for the defendant is not properly allowed unless it appears as a matter of law that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish; a motion for judgment notwithstanding the verdict is essentially a renewal of a motion for directed verdict and the rules regarding the sufficiency of the evidence to go to the jury are equally applicable. Kremer v. Food Lion, Inc., 102 N.C. App. 291, 401 S.E.2d 837 (1991).

Or His Evidence Is Sufficient to Survive Motion. — Plaintiffs' evidence tending to establish a prescriptive easement was sufficient to survive defendants' motions for directed verdict and for judgment notwithstanding the verdict and the trial court properly dismissed defendants' counterclaim. Mecimore v. Cothren, 109 N.C. App. 650, 428 S.E.2d 470, cert. denied, 334 N.C. 621, 435 S.E.2d 336 (1993).

Motion for Directed Verdict Properly Granted. — Defendant presented ample evidence of plaintiffs' breach of fiduciary duty; accordingly, the trial court did not err in denying plaintiffs' motion for a directed verdict at the close of defendant's evidence. Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993), cert. denied, 334 N.C. 621, 435 S.E.2d 338 (1993).

Scope of Review on Appeal. — Where a party moves for a directed verdict, the trial court must determine whether the evidence, when considered in the light most favorable to the nonmovant, is sufficient to take the case to the jury. Upon appeal, the scope of review is limited to those grounds asserted by the moving party before the trial court. Southern Bell Tel. & Tel. Co. v. West, 100 N.C. App. 668, 397 S.E.2d 765 (1990).

B. Statement of Specific Grounds.

Subsection (a) requires that a motion for directed verdict state specific grounds for the motion; failure to state such grounds is not a basis for an automatic reversal of the directed verdict on appeal. In re Will of Jones, 114 N.C. App. 782, 443 S.E.2d 363, cert. denied, 337 N.C. 693, 448 S.E.2d 526 (1994).

III. JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL.

Grant of Judgment N.O.V. Erroneous, etc. — In accord with first paragraph in the main volume. See Kron Medical Corp. v. Collier Cobb & Assocs., 107 N.C. App. 331, 420 S.E.2d 192, cert. denied, 333 N.C. 168, 424 S.E.2d 910 (1992).

Rule 51. Instructions to jury.

CASE NOTES

I. In General.
II. Charge to the Jury.
  A. Generally.
  B. Decisions Under Prior Law.
IV. Special Instructions.
V. Opinion of the Judge.

I. IN GENERAL.

Appellate Review of Improper Remark. — Where plaintiff alleges that he has been deprived of right to a fair trial by improper remarks in the hearing of the jury, court will first determine whether the trial judge's remarks, in light of the circumstances under which they were made, were improper and then determine whether such remarks were prejudicial. Ward v. McDonald, 100 N.C. App. 359, 396 S.E.2d 337 (1990).

Remark Regarding Need to Shorten Trial. — Trial judge did not commit prejudicial error in remarking to jury about need to shorten length of trial, which was not a statement of opinion. Ward v. McDonald, 100 N.C. App. 359, 396 S.E.2d 337 (1990).

Applied in Rowan County Bd. of Educ. v. United States Gypsum Co., 103 N.C. App. 288, 407 S.E.2d 860 (1991); Lovell v. Nationwide Mut. Ins. Co., 108 N.C. App. 416, 424 S.E.2d 181 (1993).

Stated in Hassett v. Dixie Furn. Co., 104 N.C. App. 684, 411 S.E.2d 187 (1991).

Cited in Bowden v. Bell, 116 N.C. App. 64, 446 S.E.2d 816 (1994).

II. CHARGE TO THE JURY.

A. Generally.

Editor's Note. — The cases under analysis line II, Charge to the Jury, have been reedited and printed in the supplement to distinguish between those cases decided under section (a) of this rule as it read before and after the amendment in 1985.

The purpose of instructing the jury is to clarify the issues, summarize the relevant evidence, and state the law applicable thereto. McNeill v. Durham County ABC Bd., 87 N.C. App. 50, 359 S.E.2d 500 (1987), rev'd in part on other grounds, 322 N.C. 425, 368 S.E.2d 619, rehearing denied, 322 N.C. 838, 371 S.E.2d 278 (1988).

It is the duty of the trial judge, without any special requests, to instruct the jury on the law as it applies to the substantive features of the case arising on the evidence. Millis Constr. Co. v. Fairfield Sapphire Valley, Inc., 86 N.C. App. 506, 358 S.E.2d 566 (1987).

Instruction as to Every Substantial Feature Required. — Though the trial court is no longer required to explain the application of the law to the evidence, it remains the duty of the court to instruct the jury upon the law with respect to every substantial feature of the case. Mosley & Mosley Bldrs., Inc. v. Landin Ltd., 87 N.C. App. 438, 361 S.E.2d 608 (1987).

Duty of Judge Who Undertakes to Apply Law to Evidence. — Although the trial judge is no longer required to apply the law to the evidence, if the judge undertakes to do so he must instruct completely and without omission. York v. Northern Hosp. Dist., 88 N.C. App. 183, 362 S.E.2d 859 (1987).

Form and Number of Issues Submitted Are Within Discretion of Judge. — While the judge must submit to the jury such issues raised by the pleadings and evidence as are necessary to fairly adjudicate the controversy at bar, the form and number of the issues submitted is within the sound discretion of the trial judge. McNeill v. Durham County ABC Bd., 87 N.C. App. 50, 359 S.E.2d 500 (1987), rev'd in part on other grounds, 322 N.C. 425, 368 S.E.2d 619, rehearing denied, 322 N.C. 838, 371 S.E.2d 278 (1988).

Failure of the trial court to declare and explain the law with respect to a substantial feature of the case was prejudicial error, entitling defendants to a new trial. Mosley & Mosley Bldrs., Inc. v. Landin Ltd., 87 N.C. App. 438, 361 S.E.2d 608 (1987), appeal dismissed, 322 N.C. 607, 370 S.E.2d 416 (1988).

Peremptory Instruction Properly Denied. — Defendant's evidence regarding the composition of the roadway, the absence of warning signs, the locking of the wheel, the car's tendency to overturn, and evidence that he drove at or below the speed limit, all permitted more than the single inference that defendant was negligent; therefore, trial judge properly refused to give peremptory instruction on negligence. Hinnant v. Holland, 92 N.C. App. 142, 374 S.E.2d 152 (1988), cert. denied, 324 N.C. 335, 378 S.E.2d 792 (1989).

In a personal injury action where plaintiff failed to allege permanent injuries in her pleadings and did not amend her complaint to include permanent injuries, the trial court did not err by allowing testimony that plaintiff's injuries were permanent, nor by instructing the jury on the issue of permanency; defendant's objections were all general and failed to avail themselves of the opportunity to demonstrate prejudice or to obtain a continuance as provided by this rule. Smith v. Buckhram, 91 N.C. App. 355, 372 S.E.2d 90 (1988), cert. denied, 324 N.C. 113, 377 S.E.2d 236 (1989).

Court improperly instructed the jury on the aggravation of plaintiff's pre-existing condition where the evidence showed no aggravation of a pre-existing condition. Smith v. Buckhram, 91 N.C. App. 355, 372 S.E.2d 90 (1988), cert. denied, 324 N.C. 113, 377 S.E.2d 236 (1989).

Denial of Requested Instruction Upheld. — Trial court's denial of plaintiffs' request that the jury be instructed that collision furnished some evidence of negligence was not an abuse of discretion, since plaintiffs' requested instruction amounted to an application of the law to the evidence, which is not required. Smith v. Bohlen, 95 N.C. App. 347, 382 S.E.2d 812 (1989), aff'd sub nom. State v. Brewer, 328 N.C. 515, 402 S.E.2d 380 (1991).

B. Decisions Under Prior Law.

Editor's Note. — *The cases cited below were decided prior to the 1985 amendment rewriting section (a) of this rule, which formerly provided that the judge should declare and explain the law arising on the evidence, but give no opinion on whether a fact had been proved.*

Requirement of Former § 1-180 Continued by This Rule. — The requirement of this rule that the judge "shall declare and explain the law arising on the evidence given in the case" is a continuation of the requirement contained in former § 1-180. Terry v. Jim Walter Corp., 8 N.C. App. 637, 175 S.E.2d 354 (1970).

Civil cases are governed by section (a) of this rule, which incorporates the substance of former § 1-180. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970).

The provisions of section (a) are identical to those of former § 1-180, which formerly governed the trial of civil cases as well as criminal cases. Little v. Poole, 11 N.C. App. 597, 182 S.E.2d 206 (1971).

Former § 1-180 is now embodied in substance within section (a) of this rule. Heath v. Swift Wings, Inc., 40 N.C. App. 158, 252 S.E.2d 526, cert. denied, 297 N.C. 453, 256 S.E.2d 806 (1979).

Although the provisions of § 1-180 have been repealed and are now embodied in subsection (a) of this rule, the law remains, for all practical purposes, unchanged. Consolidated Sys. v. Granville Steel Corp., 63 N.C. App. 485, 305 S.E.2d 57 (1983).

This rule confers a substantial legal right, and imposes upon the trial judge a positive duty, so that his failure to charge on the substantial features of the case arising on the evidence is prejudicial error, even without a prayer for special instruction. Clay v. Garner, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

Not Dependent on Request for Special Instructions. — This rule confers a substantial legal right, not dependent on a request for special instructions, and failure to charge on the material features of a case is prejudicial error. Horne v. Wall, 27 N.C. App. 373, 219 S.E.2d 288 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 697 (1976).

The trial court has a duty, without a request for special instruction, to explain the law and apply it to the evidence on all substantial features of the case. The failure to do so constitutes prejudicial error and entitles the aggrieved party to a new trial. Stiles v. Charles M. Morgan Co., 64 N.C. App. 328, 307 S.E.2d 409 (1983).

This rule requires the trial judge to perform two positive acts: (1) To declare and explain the law arising on the evidence presented in the case; and (2) to review such evidence to the extent necessary to explain the application of that law to the particular facts and circumstances of the case. Bodenheimer v. Bodenheimer, 17 N.C. App. 434, 194 S.E.2d 375, cert. denied, 283 N.C. 392, 196 S.E.2d 274 (1973); Horne v. Wall, 27 N.C. App. 373, 219 S.E.2d 288 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 697 (1976); Brown v. Scism, 50 N.C. App. 619, 274 S.E.2d 897, cert. denied, 302 N.C. 396, 276 S.E.2d 919 (1981).

The chief purpose of a charge is to aid the jury to clearly understand the case and arrive at a correct verdict. Turner v. Turner, 9 N.C. App. 336, 176 S.E.2d 24 (1970); Warren v. Parks, 31 N.C. App. 609, 230 S.E.2d 684 (1976), cert. denied, 292 N.C. 269, 233 S.E.2d 396 (1977); Burns v. McElroy, 57 N.C. App. 299, 291 S.E.2d 278 (1982).

And to Eliminate Irrelevant Matters. — The purpose of the court's charge is to eliminate irrelevant matters so that the jury may understand and appreciate the facts which determine the case. Brown v. Scism, 50 N.C. App. 619, 274 S.E.2d 897, cert. denied, 302 N.C. 396, 276 S.E.2d 919 (1981).

In applying the law to the evidence the jury must be given guidance as to what facts, if found by them to be true, would justify them in answering the issues submitted to them in the affirmative or the negative. Broadnax v. Deloatch, 20 N.C. App. 430, 201 S.E.2d 525, cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974).

Where the jury is given no guidance as to what facts, if found by them to be true, would justify them in answering the sole issue submitted to them either in the affirmative or the negative, the trial judge has failed to comply with the mandate of section (a) of this rule. American Credit Co. v. Brown, 10 N.C. App. 382, 178 S.E.2d 649 (1971).

Judge Must Declare and Explain the Law Arising on the Evidence. — It is incumbent upon the judge to declare and explain the law arising on the evidence as to all substantial features of the case, without any special prayer for instructions to that effect. Terry v. Jim Walter Corp., 8 N.C. App. 637, 175 S.E.2d 354 (1970); Link v. Link, 9 N.C. App. 135, 175 S.E.2d 735 (1970), rev'd on other grounds, 278 N.C. 181, 179 S.E.2d 697 (1971); Investment Properties of Asheville, Inc. v. Norburn, 281 N.C. 191, 188 S.E.2d 342 (1972); Warren v. Parks, 31 N.C. App. 609, 230 S.E.2d 684 (1976), cert. denied, 292 N.C. 269, 233 S.E.2d 396 (1977); Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

The duty of the judge is to declare the law arising on the evidence and to explain the application of the law thereto. Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971).

In charging the jury in any civil action, the judge shall declare and explain the law arising on the evidence given in the case. Watson v. White, 60 N.C. App. 106, 298 S.E.2d 174 (1982), rev'd on other grounds, 309 N.C. 498, 308 S.E.2d 268 (1983).

The provisions of this rule require that the trial judge in his charge to the jury shall declare and explain the law arising on the evidence in the case, and unless this mandatory provision of the statute is observed, there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented. Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972).

It is the duty of the court to charge the law applicable to the substantive features of the case arising on the evidence, without special request, and to apply the law to the various factual situations presented by the conflicting evidence. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971); Investment Properties of Asheville, Inc. v. Norburn, 281 N.C. 191, 188 S.E.2d 342 (1972); Howell v. Howell, 24 N.C. App. 127, 210 S.E.2d 216 (1974); Martin v. Amusements of Am., Inc., 38 N.C. App. 130, 247 S.E.2d 639, cert. denied, 296 N.C. 106, 249 S.E.2d 804 (1978); Harris v. Bridges, 59 N.C. App. 195, 296 S.E.2d 299 (1982).

In every case the court has the duty to instruct the jury correctly on all substantive features of the case. Duke v. Mutual Life Ins. Co., 22 N.C. App. 392, 206 S.E.2d 796, rev'd on other grounds, 286 N.C. 244, 210 S.E.2d 187 (1974).

The law must be declared, explained and applied to the evidence bearing on the substantial and essential features of a case. Coble v. Martin Fireproofing Ga., Inc., 25 N.C. App. 671, 214 S.E.2d 239 (1975).

When charging the jury in a civil case it is the duty of the trial court to explain the law and to apply it to the evidence on the substantial issues of the action. Cockrell v. Cromartie Transp. Co., 295 N.C. 444, 245 S.E.2d 497 (1978).

This rule imposes upon the trial judge a duty to explain the law and to apply it to the evidence on all substantial features of the case. Federated Mut. Ins. Co. v. Hardin, 67 N.C. App. 487, 313 S.E.2d 801 (1984); Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

This rule imposes a positive duty on the trial judge to charge on the substantial features of the case as the evidence dictates. Hord v. Atkinson, 68 N.C. App. 346, 315 S.E.2d 339 (1984).

The trial court has a duty to explain the law and apply it to the evidence on all substantial features of the case. Failure to do so constitutes prejudicial error and entitles the aggrieved party to a new trial. Scher v. Antonucci, 77 N.C. App. 810, 336 S.E.2d 434 (1985).

The trial court has wide discretion in presenting the issues to the jury, and no abuse of discretion will be found where the issues are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause. Murrow v. Daniels, 321 N.C. 494, 364 S.E.2d 392 (1988), decided under rule as it read prior to amendment.

A mere declaration of the law in general terms and a statement of the contentions of the parties is insufficient. Terry v. Jim Walter Corp., 8 N.C. App. 637, 175 S.E.2d 354 (1970); Link v. Link, 9 N.C. App. 135, 175 S.E.2d 735 (1970), rev'd on other grounds, 278 N.C. 181, 179 S.E.2d 697 (1971); Jones v. Bess, 26 N.C. App. 1, 214 S.E.2d 599 (1975).

This rule imposes upon the trial judge the positive duty of declaring and explaining the law arising on the evidence as to all the substantial features of the case; a mere declaration of the law in general terms and a statement of the contentions of the parties is not sufficient to satisfy the requirements of this rule. Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972); Hunt v. Montgomery Ward & Co., 49 N.C. App. 642, 272 S.E.2d 357 (1980).

Charge given by trial court that merely recapitulated the evidence, stated the parties' contentions and recited certain general principles of contract law would not suffice. Coble v. Martin Fireproofing Ga., Inc., 25 N.C. App. 671, 214 S.E.2d 239 (1975).

As Is a Charge Which Fails to Apply the Law to the Evidence. — A charge which contains a general explanation of the law but fails to apply the law to the evidence given in the case then being tried is insufficient. Campbell v. Campbell, 18 N.C. App. 665, 197 S.E.2d 804 (1973).

Judge's duty is not to charge the jury by implication, but to declare and explain the law arising on the evidence given in the case. Harris v. Bridges, 59 N.C. App. 195, 296 S.E.2d 299 (1982).

What Issues to Be Submitted to Jury. — The judge must submit to the jury such issues as when answered by them will resolve all material controversies between the parties, as raised by the pleadings. Harrison v. McLear, 49 N.C. App. 121, 270 S.E.2d 577 (1980); Davis v. Davis, 58 N.C. App. 25, 293 S.E.2d 268, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982).

The judge must bring into view the relations of the particular evidence adduced to the particular issues involved. This is what is meant by the expression that the judge must apply the facts to the law for the enlightenment of the jury. Link v. Link, 9 N.C. App. 135, 175 S.E.2d 735 (1970), rev'd on other grounds, 278 N.C. 181, 179 S.E.2d 697 (1971).

Section (a) of this rule requires the judge to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971); Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972); Howell v. Howell, 24 N.C. App. 127, 210 S.E.2d 216 (1974).

In order for the trial court to discharge its duty under this rule, the court must give the jury a clear mandate as to what facts, for which there was support in the evidence, it would have to find in order to answer the issue either in the affirmative or in the negative. Deep Run Milling Co. v. Williams, 60 N.C. App. 160, 298 S.E.2d 205 (1982).

The trial judge must explain and apply the law to the specific facts pertinent to the issue involved. Harrison v. McLear, 49 N.C. App. 121, 270 S.E.2d 577 (1980); Davis v. Davis, 58 N.C. App. 25, 293 S.E.2d 268, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982).

And Relate the Law to the Variant Factual Situations Presented. — When charging the jury in a civil action the trial judge shall declare and explain the law arising on the evidence. He must relate and apply the law to the variant factual situations presented by some reasonable view of the evidence. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

The trial judge is not required to review all of the evidence. Maynard v. Pigford, 17 N.C. App. 129, 193 S.E.2d 293 (1972).

But he must summarize it sufficiently to permit him to explain the application of the law thereto. Maynard v. Pigford, 17 N.C. App. 129, 193 S.E.2d 293 (1972).

The judge is not required to state the evidence except to the extent necessary to explain how the law applies to the evidence presented in the case being tried. Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972).

Summary of the material aspects of the evidence sufficient to bring into focus controlling legal principles is all that is required with respect to stating the evidence. Clay v. Garner, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

The judge is not required to declare and explain the law on a set of hypothetical facts. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

Trial court is not required to read technical statutory language to the jury. Tuttle v. Tuttle, 38 N.C. App. 651, 248 S.E.2d 896 (1978), cert. denied, 296 N.C. 589, 254 S.E.2d 32 (1979).

Fact that some language of the complaint was used in declaring the law of the case is not error so long as the judge explains all the law arising from the evidence. Broadnax v. Deloatch, 20 N.C. App. 430, 201 S.E.2d 525, cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974).

Where the trial court adequately instructs the jury as to the law on every material aspect of the case arising from the evidence and applies the law fairly to variant factual situations presented by the evidence, the charge is sufficient. Murrow v. Daniels, 321 N.C. 494, 364 S.E.2d 392 (1988), decided under rule as it read prior to amendment.

It is error for the trial court to charge the jury upon an abstract principle of law which is not presented by the allegations and evidence. Huggins v. Kye, 10 N.C. App. 221, 178 S.E.2d 127 (1970).

Instructions on elements of damages are not proper if the evidence does not reveal a basis for such an award. Spears v. Service Distrib. Co., 27 N.C. App. 646, 219 S.E.2d 817 (1975).

Failure to explain the law and apply it to the evidence on all substantial features of the case constitutes prejudicial error for which the aggrieved party is entitled to a new trial. Investment Properties of Asheville, Inc. v. Norburn, 281 N.C. 191, 188 S.E.2d 342 (1972); Clifford v. River Bend Plantation, Inc., 55 N.C. App. 514, 286 S.E.2d 352 (1982).

Where the jury was left to determine for itself, without adequate explanation from the court, what law arose on the evidence in the case and how that law should be applied to the evidence, defendant was entitled to a new trial. Turner

v. Turner, 9 N.C. App. 336, 176 S.E.2d 24 (1970).

Although defendant's trial counsel made no objection to the form of the issues which were submitted to the jury, defendant was entitled to have the issues decided by the jury under a charge from the court which correctly declared and explained the law arising on the evidence, and for errors in the charge there must be a new trial. Price v. Conley, 12 N.C. App. 636, 184 S.E.2d 405 (1971).

The trial judge's failure to charge the law on the substantial features of the case arising on the evidence is prejudicial error. Turner v. Turner, 9 N.C. App. 336, 176 S.E.2d 24 (1970); Price v. Conley, 12 N.C. App. 636, 184 S.E.2d 405 (1971); Clay v. Garner, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

As Does Failure to Explain the Law as Applied to Evidence Susceptible of Several Interpretations. — When the evidence is susceptible of several interpretations, a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975); Williamson v. Vann, 42 N.C. App. 569, 257 S.E.2d 102 (1979).

The jury charge must be considered contextually as a whole, and when so considered, if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed, an exception that the instruction might have been better stated will not be sustained. Jones v. Satterfield Dev. Co., 16 N.C. App. 80, 191 S.E.2d 435, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972); Hanks v. Nationwide Mut. Fire Ins. Co., 47 N.C. App. 393, 267 S.E.2d 409 (1980).

In reviewing the charge of a trial court, the Court of Appeals must read and consider the charge as a whole. When a charge presents the law fairly and clearly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous. State v. Wade, 49 N.C. App. 257, 271 S.E.2d 77 (1980), cert. denied, 315 N.C. 596, 341 S.E.2d 37 (1986).

But erroneous instructions on the burden of proof are not cured by contextual construction. Starkey Paint Co. v. Springfield Life Ins. Co., 24 N.C. App. 507, 211 S.E.2d 498 (1975).

Conflicting instructions on a material aspect of the case must be held prejudicial error, since it cannot be determined that the jury was not influenced by the incorrect portion of the charge. Cross v. Beckwith, 16 N.C. App. 361, 192 S.E.2d 64 (1972), rev'd on other grounds, 293 N.C. 224, 238 S.E.2d 130 (1977).

Conflicting instructions on the applicable law or on a substantive feature of the case, particularly on the burden of proof, entitle defendant to a new trial, since it must be assumed on appeal that the jury was influenced in coming to a verdict by that portion of the charge which was erroneous. State v. Jones, 20 N.C. App. 454, 201 S.E.2d 552 (1974).

When there are conflicting instructions to the jury upon a material point, the one correct and the other incorrect, a new trial must be granted because it will not be assumed that the jurors possessed such discriminating knowledge of the law as would enable them to disregard the erroneous and to accept the correct statement of the law as their guide. Starkey Paint Co. v. Springfield Life Ins. Co., 24 N.C. App. 507, 211 S.E.2d 498 (1975).

An instruction relating to a factual situation not properly supported by the evidence is erroneous. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

Where the instructions of the court are based upon an assumption of facts which are not in evidence, they must be held for error. Clark v. Barber, 20 N.C. App. 603, 202 S.E.2d 347 (1974).

No Error in Failure to Instruct as to Contention Not Supported by Evidence. — There being no evidence to support a finding of ratification, there was no error prejudicial to the defendant in the failure of the trial court to instruct the jury as to the defendant's contention with respect thereto. Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971).

While it is the general rule that in a civil case the trial judge must declare and explain the law arising in the evidence, even in the absence of a special request such rule has certain accepted limits. The instruction must be based on evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim or defense asserted. In re Will of Cooley, 66 N.C. App. 411, 311 S.E.2d 613 (1984).

Submission of Defense. — When a

party contends that certain acts constitute a defense, the trial court must submit the issue to the jury with appropriate instructions if there is evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the defense asserted. Plymouth Pallet Co. v. Wood, 51 N.C. App. 702, 277 S.E.2d 462, cert. denied, 303 N.C. 545, 281 S.E.2d 393 (1981).

Specific Acts or Omissions Which Could Constitute Negligence or Contributory Negligence Must Be Stated. — Under this section the trial court must relate to the jury the specific acts or omissions which, under the pleadings and evidence, could constitute negligence or contributory negligence. Everhart v. LeBrun, 52 N.C. App. 139, 277 S.E.2d 816 (1981); Zach v. Surry-Yadkin Elec. Membership Corp., 57 N.C. App. 326, 291 S.E.2d 290 (1982).

In a personal injury action arising out of a collision, it is error for the court to fail to instruct the jury as to what effect a finding of plaintiff's intoxication at the time of the collision would have upon the issue of plaintiff's contributory negligence. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970).

Where the judge failed to explain to the jury what bearing their findings as to the facts would have on the issue of defendant's negligence and the instructions gave the jury unlimited authority to find the defendant generally negligent for any reason the evidence might suggest to them, there was error. Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972).

Where trial judge defined burden of proof, negligence, and proximate cause in general terms and then recapitulated the evidence and the contentions of the parties, and instructed as to the measure of damages, but failed to instruct the jury as to what facts if found by them to be true would constitute negligence, there was reversible error. Brady v. Smith, 18 N.C. App. 293, 196 S.E.2d 580 (1973).

Where the instructions to the jury on the issue of defendant's negligence consisted merely of a brief summary of the evidence, a statement of the issue, a statement on the burden of proof, and general definitions of negligence and proximate cause, and where the trial court failed to relate the principles of law set forth in its instructions to the evidence in this personal injury action, failed to specify the duties owed by defendant to plaintiff's decedent and the acts or omissions by defendant established by the evidence from which the jury could find a breach of those duties, and failed to relate the contentions of negligence supported by the evidence, such failure was inherently prejudicial under section (a) of this rule. Hunt v. Montgomery Ward & Co., 49 N.C. App. 642, 272 S.E.2d 357 (1980).

Where the court reviewed in detail evidence of plaintiff's injuries, the failure of the court to repeat such evidence in enunciating the rule for the measurement of damages for personal injury was not error. Love v. Hunt, 17 N.C. App. 673, 195 S.E.2d 135 (1973).

By alleging the existence of a pertinent city ordinance, introducing it in evidence and presenting testimony tending to show its violation by defendants, plaintiffs made the ordinance a substantial feature of the case, thereby imposing on the trial judge a positive duty to give appropriate jury instructions with respect to the ordinance. Pharo v. Pearson, 28 N.C. App. 171, 220 S.E.2d 359 (1975).

Where the question of whether time was of the essence was a substantial feature of a case, the trial judge was required, without a request, to declare and explain the law with respect thereto. Gelder & Assocs. v. Continental Ins. Co., 15 N.C. App. 686, 190 S.E.2d 674 (1972).

Paraphrase of Law in Condemnation Action Held Insufficient. — Where, in a highway condemnation action, plaintiff's witness, an expert real estate appraiser, testified that the value of defendant's land was increased by the taking because a roadway fronting the property was paved, a paraphrase of the law of benefits contained in the trial court's statement to the jury of the plaintiff's contentions was not adequate to satisfy the mandate of section (a) of this rule. North Carolina Bd. of Transp. v. Rand, 299 N.C. 476, 263 S.E.2d 565 (1980).

Trial judge properly refused to submit instruction on "proper control" of automobile. See Dunn v. Herring, 75 N.C. App. 308, 330 S.E.2d 834, cert. denied, 314 N.C. 538, 335 S.E.2d 16 (1985).

Instruction for Following Too Closely. — Where violation of § 20-152(a) bore directly on the issue of defendant's negligence, which was a substantial feature of the case, the court should have declared and explained the section in its charge to the jury, and should also have explained that violation of this section was negligence per se. It has this duty irrespective of plaintiff's request for special instructions. Scher v. Antonucci, 77 N.C. App. 810, 336 S.E.2d 434 (1985).

Instruction on Permanent Injury. — Where doctor testified that in his expert opinion plaintiff had an impairment rating to her neck of four percent (4%) as a result of her injury, an impairment rating to her "low" back of five percent (5%), and to her head (for headaches) of three percent (3%), resulting in a 12 percent (12%) impairment of her physical being, this evidence was sufficient to support an instruction on permanent injury. Wooten v. Warren ex rel. Gilmer, 117 N.C. App. 350, 451 S.E.2d 342 (1994).

The credibility of the witnesses and conflicts in the evidence are for the jury, not the court. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970); Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

Peremptory Instructions Not Abolished. — The new Rules of Civil Procedure have not abolished peremptory instructions in proper cases. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

Peremptory instruction does not deprive the jury of right to reject evidence because of lack of credibility. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

When Peremptory Instruction May Be Given. — When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction to the effect that if the jury finds the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner. Defendant's denial of an alleged fact raises an issue as to its existence even though he offers no evidence tending to contradict that offered by plaintiff. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

The correct form of a peremptory instruction is that the jury should answer the issue as specified if the jury should find from the greater weight of the evidence that the facts are as all the evidence tends to show. The court should also charge that if the jury does not so find they should answer the issue in the opposite manner. In other words, the court must leave it to the jury to decide the issue. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

Duty of Counsel to Point Out Misstatement of the Evidence. — When the court's statement of the evidence in condensed form does not correctly reflect the testimony of the witnesses in any particular respect, it is the duty of counsel to call attention thereto and request a correction. Clay v. Garner, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

When Inadvertent Misstatement of Evidence Is Reversible Error. — An inadvertence by the court in recapitulating the evidence will not be grounds for reversible error unless it is called to the attention of the court in time for correction. Sims v. Virginia Homes Mfg. Corp., 32 N.C. App. 193, 231 S.E.2d 287 (1977).

A broadside assignment of error to the charge as a whole is ineffective to bring up any portion of the charge for review. Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972), vacated on other grounds, 283 N.C. 277, 196 S.E.2d 262 (1973).

Reversal Where Instruction Is Patently Erroneous. — Although where there is no evidence in the record on appeal the trial court's charge will be sustained, it is also true that where an instruction is patently or inherently erroneous to the prejudice of the appellant, the judgment will be reversed for new trial. Bodenheimer v. Bodenheimer, 17 N.C. App. 434, 194 S.E.2d 375, cert. denied, 283 N.C. 392, 196 S.E.2d 274 (1973).

IV. SPECIAL INSTRUCTIONS.

Failure to Give Proper Specific Instruction, etc. —

In accord with the main volume. See Stimpson Hosiery Mills, Inc. v. Pam Trading Corp., 98 N.C. App. 543, 392 S.E.2d 128 (1990).

V. OPINION OF THE JUDGE.

Court's Daily Prayer. — Absent a showing of prejudice by appellants, it could not be concluded that the trial court's daily prayer amounted to an impermissible expression of opinion in violation of subsection (a) of this Rule. Hill v. Cox, 108 N.C. App. 454, 424 S.E.2d 201 (1993).

Informal Remarks Held Not Reversible Error. — Judge's remarks to jury on the opening of court for the second and third days of trial, to the effect that jurors should "sit back, relax and stay tuned for the next portion of the trial," may have been informal and even jocular but did not constitute reversible error. Lenins v. K-Mart Corp., 98 N.C. App. 590, 391 S.E.2d 843 (1990).

Remarks Not Reversible Error. — While remarks made after the verdict was returned by the court were perhaps not appropriate under a strict reading of this rule, they did not constitute reversible error. Haymore v. Thew Shovel Co., 116 N.C. App. 40, 446 S.E.2d 865 (1994).

Rule 52. Findings by the court.

CASE NOTES

I. In General.
II. Findings and Conclusions, Generally.
III. Findings and Conclusions on Grant or Denial of Motions, Preliminary Injunctions, etc.

I. IN GENERAL.

This rule necessarily contemplates that facts be found before conclusions can be reached. Baker v. Baker, 102 N.C. App. 792, 404 S.E.2d 20 (1991).

Where an order's rationale is tainted by a process that violates this rule, a new trial of the issues is required. Baker v. Baker, 102 N.C. App. 792, 404 S.E.2d 20 (1991).

Issues Must Be Resolved by Trial Court Before Appellate Review. — In a trial without a jury, it is the duty of the trial judge to resolve all issues raised by the pleadings and the evidence by making findings of fact and drawing therefrom conclusions of law upon which to base a final order or judgment. When all issues are not so resolved by the trial court, an appellate court has no option other than to vacate the order and remand the cause to the trial court for completion. Small v. Small, 107 N.C. App. 474, 420 S.E.2d 678 (1992).

Requirement of Appropriately Detailed Findings. — The requirement of appropriately detailed findings is designed to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system. Mashburn v. First Investors Corp., 102 N.C. App. 560, 402 S.E.2d 860 (1991).

Under this rule, the facts required to be found specially are those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached. Guilford County Planning & Dev. Dep't v. Simmons, 102 N.C. App. 325, 401 S.E.2d 659, cert. denied, 329 N.C. 496, 407 S.E.2d 533 (1991).

Rescission Offer. — Judgment that simply made the bare conclusion that an investment firm tendered a "valid" rescission offer and that, therefore, the investor was barred from bringing suit under the provisions of subdivision (g)(1) of § 78A-56 did not rise to the level of separate findings of fact and conclusions of law; the judgment, therefore, did not comport with the requirements of § 1A-1, Rule 41(b) and subsection (a) of this rule. Mashburn v. First Investors Corp., 102 N.C. App. 560, 402 S.E.2d 860 (1991).

Applied in Patrick v. Ronald Williams, Professional Ass'n, 102 N.C. App. 355, 402 S.E.2d 452 (1991); Mashburn v. First Investors Corp., 111 N.C. App. 398, 432 S.E.2d 869 (1993).

Quoted in Kirby Bldg. Sys. v. McNiel, 327 N.C. 234, 393 S.E.2d 827 (1990); Provident Finance Co. v. Rowe, 101 N.C. App. 367, 399 S.E.2d 368 (1991); Institution Food House, Inc. v. Circus Hall of Cream, Inc., 107 N.C. App. 552, 421 S.E.2d 370 (1992).

Stated in Statesville Stained Glass, Inc. v. T.E. Lane Constr. & Supply Co., 110 N.C. App. 592, 430 S.E.2d 437 (1993).

Cited in Blalock Elec. Co. v. Grassy Creek Dev. Corp., 99 N.C. App. 440, 393 S.E.2d 354 (1990); Tay v. Flaherty, 100 N.C. App. 51, 394 S.E.2d 217 (1990); Oglesby v. S.E. Nichols, Inc., 101 N.C. App. 676, 401 S.E.2d 92 (1991); Grant v. Cox, 106 N.C. App. 122, 415 S.E.2d 378 (1992); Thacker v. Thacker, 107 N.C. App. 479, 420 S.E.2d 479 (1992); Lowry v. Duke Univ. Medical Ctr., 109 N.C. App. 83, 425 S.E.2d 739 (1993); Wiggins v. Triesler Co., 115 N.C. App. 368, 444 S.E.2d 245 (1994); Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994); Ward v. Ward, 116 N.C. App. 643, 448 S.E.2d 862 (1994); Shamley v. Shamley, 117 N.C. App. 175, 455 S.E.2d 435 (1994).

II. FINDINGS AND CONCLUSIONS, GENERALLY.

Timeliness of Request. — A request for findings and conclusions under subsection (a)(2) of this rule is untimely if made after the entry of a trial court's order. Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 623 (1993).

Under § 1A-1, Rule 60(b), the trial court is not required to make findings of fact unless requested to do so by a party. Nations v. Nations, 111 N.C. App. 211, 431 S.E.2d 852 (1993).

Bare Conclusions Insufficient. — Although this rule requires that in all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law, a bare conclusion such as the one in this case does not meet the requirements of subdivision (a)(1). Chapel Hill-Carrboro City Sch. Sys. v. Chavioux, 116 N.C. App. 131, 446 S.E.2d 612 (1994).

The findings recited by the Disciplinary Committee in its order were inadequate to support its conclusion that the defendant's letter was threatening, because the Committee made no findings as to the exact nature of that threat nor as to the specific relationship between the defendant's "threatening letter" and the administration of justice. Thus the Committee's findings failed to conform to subdivision (a)(1) of this rule. North Carolina State Bar v. Beaman, 100 N.C. App. 677, 398 S.E.2d 68 (1990).

Deletion of Finding Without Reconsidering Conclusion Prejudicial to Defendant. — Where a judge initially found that defendant had committed adultery and then deleted that finding without reconsidering his conclusions, including the conclusion that plaintiff was entitled to permanent alimony, that process violated the sequence required by this rule to the prejudice of the defendant. Baker v. Baker, 102 N.C. App. 792, 404 S.E.2d 20 (1991).

III. FINDINGS AND CONCLUSIONS ON GRANT OR DENIAL OF MOTIONS, PRELIMINARY INJUNCTIONS, ETC.

Findings and Conclusions Generally Not Required on Motions Absent Request. —

Where no request was made that the trial judge make findings to support the denial of its motion, it was presumed that the judge made the determination based upon proper evidence. House Healers Restorations, Inc. v. Ball, 112 N.C. App. 783, 437 S.E.2d 383 (1993).

Discretion of Court. — A court is not required to make findings of fact and conclusions of law when ruling on preliminary motions, but it has the discretion to do so; however, if a court does enter conclusions of law, they must be supported by adequate findings. Epps v. Duke Univ., Inc., 116 N.C. App. 305, 447 S.E.2d 444 (1994).

Consent Judgment. — A consent judgment is merely a recital of the parties' agreement and not an adjudication of rights. This type of judgment need not contain findings of fact and conclusions of law because the judge merely sanctions the agreement of the parties. In re Estate of Peebles, 118 N.C. App. 296, 454 S.E.2d 854 (1995).

Rule 53. Referees.

Legal Periodicals. —

For note, "Rent-A-Judges and the Cost of Selling Justice," see 44 Duke L.J. 166.

CASE NOTES

I. In General.

I. IN GENERAL.

Cited in Brown v. Brown, 112 N.C. App. 15, 434 S.E.2d 873 (1993).

ARTICLE 7.

Judgment.

Rule 54. Judgments.

Legal Periodicals. —
For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

CASE NOTES

I. In General.
II. Judgment on Multiple Claims or Involving Multiple Parties.

I. IN GENERAL.

Purpose. — The purpose of subsection (c) is to provide plaintiff with whatever relief is supported by the complaint's factual allegations and proof at trial. Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

A trial court cannot confer appeal status under subsection (b) by denominating its decision a "final judgment" if its ruling is not indeed such a judgment; the trial court's order denying insurance company's motion for summary judgment did not constitute a "final" judgment and was therefore not appealable. Cagle v. Teachy, 111 N.C. App. 244, 431 S.E.2d 801 (1993).

Finality. — This rule indicates that finality with respect to parties and claims is a key aspect of a judgment as it relates to its entry and appealability. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

The importance of finality to the timing of entry of judgment is apparent more from the interrelationship between this rule and § 1A-1, Rule 58 than from the express language of Rule 58 itself. The principal concern regarding finality is that all matters for determination be resolved. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Requirements of Rule. — This rule imposes three requirements on the court sitting as finder of fact: it must (1) find the facts on all issues joining the pleadings; (2) declare the conclusions of law arising from the facts found; and (3) enter judgment accordingly. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Interlocutory Order Defined. —
Order requiring party to take actions "pending further orders of this court," was an interlocutory order, since it was made during the pendency of the action and did not dispose of the case in a final manner. Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148, 437 S.E.2d 699 (1993).

When Summary Judgment is Immediately Appealable. — Where dismissal of an appeal of a summary judgment could result in two different trials on the same issues, thereby creating the possibility of inconsistent verdicts, a substantial right is prejudiced and the summary judgment is immediately appealable. Taylor v. Brinkman, 108 N.C. App. 767, 425 S.E.2d 429, cert. denied, 333 N.C. 795, 431 S.E.2d 30 (1993).

Alternative Method to Appeal Interlocutory Orders. — An interlocutory order not appealable under subsection (b) may nevertheless be appealed pursuant to § 1-277 and § 7A-27(d) of the Rules of Civil Procedure which permit an appeal of an interlocutory order which (1) affects a substantial right, or (2) in effect determines the action and prevents a judgment from which appeal might be taken, or (3) discontinues the action, or (4) grants or refuses a new trial. Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994).

Applied in Hare v. Butler, 99 N.C. App. 693, 394 S.E.2d 231 (1990); Miller v. Swann Plantation Dev. Co., 101 N.C. App. 394, 399 S.E.2d 137 (1991); Pitt v. Williams, 101 N.C. App. 402, 399 S.E.2d 366 (1991); Hoots v. Pryor, 106 N.C. App. 397, 417 S.E.2d 269 (1992); McNeil v. Hicks, 111 N.C. App. 262, 431 S.E.2d 868 (1993); Gunter v. Anders, 114 N.C. App. 61, 441 S.E.2d 167; Reynolds v. Reynolds, 114 N.C. App. 393, 442 S.E.2d 133 (1994).

Quoted in Darcy v. Osborne, 101 N.C. App. 546, 400 S.E.2d 95 (1991); Janus

Theatres of Burlington, Inc. v. Aragon, 104 N.C. App. 534, 410 S.E.2d 218 (1991); Donnelly v. Guilford County, 107 N.C. App. 289, 419 S.E.2d 365 (1992).

Stated in Driver v. Burlington Aviation, Inc., 110 N.C. App. 519, 430 S.E.2d 476 (1993); Farm Credit Bank v. Van Dorp, 110 N.C. App. 759, 431 S.E.2d 222 (1993); Thrift v. Food Lion, Inc., 111 N.C. App. 758, 433 S.E.2d 481 (1993); Moose v. Nissan of Statesville, Inc., 115 N.C. App. 423, 444 S.E.2d 694 (1994); City of Winston-Salem v. Yarbrough, 117 N.C. App. 340, 451 S.E.2d 358 (1994).

Cited in Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990); Beatty v. Charlotte-Mecklenburg Bd. of Educ., 99 N.C. App. 753, 394 S.E.2d 242 (1990); Myers v. Barringer, 101 N.C. App. 168, 398 S.E.2d 615 (1990); Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991); Gardner v. Gardner, 106 N.C. App. 635, 418 S.E.2d 260 (1992); Branch Banking & Trust Co. v. Thompson, 107 N.C. App. 53, 418 S.E.2d 694 (1992); T.H. Blake Contracting Co. v. Sorrells, 109 N.C. App. 119, 426 S.E.2d 85 (1993); Berkeley Fed. Sav. & Loan Ass'n v. Terra Del Sol, Inc., 111 N.C. App. 692, 433 S.E.2d 449 (1993); Richmond County v. North Carolina Low-Level Radioactive Waste Mgt. Auth., 335 N.C. 77, 436 S.E.2d 113 (1993); Beau Rivage Plantation, Inc. v. Melex USA, Inc., 112 N.C. App. 446, 436 S.E.2d 152 (1993); Hartman v. Walkertown Shopping Ctr., Inc., 113 N.C. App. 632, 439 S.E.2d 787, cert. denied, 336 N.C. 780, 447 S.E.2d 422 (1994); Dickerson Carolina, Inc. v. Harrelson, 114 N.C. App. 693, 443 S.E.2d 127 (1994); Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 444 S.E.2d 252 (1994); Bray v. North Carolina Farm Bureau Mut. Ins. Co., 115 N.C. App. 438, 445 S.E.2d 79, cert. granted, — N.C. —, 449 S.E.2d 565 (1994); Coastal Ready-Mix Concrete Co. v. North Carolina Coastal Resources Comm'n, 116 N.C. App. 119, 446 S.E.2d 823 (1994); Rouse v. Pitt County Mem. Hosp., 116 N.C. App. 241, 447 S.E.2d 505 (1994), cert. granted, 339 N.C. 615, 454 S.E.2d 257 (1995); Gillespie v. Gillespie, 116 N.C. App. 660, 448 S.E.2d 857 (1994); North River Ins. Co. v. Young, 117 N.C. App. 663, 453 S.E.2d 205 (1995); Rich v. R.L. Casey, Inc., 118 N.C. App. 156, 454 S.E.2d 666 (1995).

II. JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.

Determination of Fundamental Claim Immediately Appealable. — By ordering a former employee to assign a patent, the trial court effectively decided ownership of the patented process, and where this determination was fundamental to the disposition of the remaining claims, grant of summary judgment on the ownership claim was immediately appealable as affecting a substantial right. Liggett Group, Inc. v. Sunas, 113 N.C. App. 19, 437 S.E.2d 674 (1993).

Factors for Immediate Appealability of Judgment. — In order for a judgment in a multiple claim or multiple party action to be immediately appealable, the judgment must be (1) in effect final as to one or more of the claims or parties; and (2) certified for appeal by the trial judge. If the judgment is final as to one or more of the claims or parties but has not been certified for appeal by the trial court, no appeal will lie unless an immediate appeal is authorized by some other rule or statute, such as § 1-277 or § 7A-27. North Carolina R.R. v. City of Charlotte, 112 N.C. App. 762, 437 S.E.2d 393 (1993), appeal dismissed, cert. denied, 336 N.C. 608, 447 S.E.2d 397 (1994).

Order Denying Release of Escrow Funds Held Not Appealable. — The effect of an order denying the release of the funds held in escrow under § 58-36-25 was temporary and not permanent where the Commissioner's order only determined that the funds are not to be released now, and did not purport to determine who is entitled to the money; for these reasons, an appeal of the order was interlocutory and was not immediately appealable under either this rule or §§ 1-277 and 7A-27(d). State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 102 N.C. App. 809, 403 S.E.2d 597 (1991).

Denial of Summary Judgment Only Appealable, etc. —

The denial of a motion for summary judgment is not a final judgment, and is generally not immediately appealable, even if the trial court has attempted to certify it for appeal under subsection (b) of this rule. Henderson v. LeBauer, 101 N.C. App. 255, 399 S.E.2d 142, cert. denied, 328 N.C. 731, 404 S.E.2d 868 (1991).

Rule 55. Default.

(a) *Entry.* — When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default.

(b) Judgment. — Judgment by default may be entered as follows:

(1) By the Clerk. — When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain.

In all cases wherein, pursuant to this rule, the clerk enters judgment by default upon a claim for debt which is secured by any pledge, mortgage, deed of trust or other contractual security in respect of which foreclosure may be had, or upon a claim to enforce a lien for unpaid taxes or assessments under G.S. 105-414, the clerk may likewise make all further orders required to consummate foreclosure in accordance with the procedure provided in Article 29A of Chapter 1 of the General Statutes, entitled "Judicial Sales."

(2) By the Judge. — In all other cases the party entitled to a judgment by default shall apply to the judge therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian ad litem or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the judge to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to take an investigation of any other matter, the judge may conduct such hearings or order such references as he deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by the Constitution or by any statute of North Carolina. If the plaintiff seeks to establish paternity under Article 3 of Chapter 49 of the General Statutes and the defendant fails to appear, the judge shall enter judgment by default.

(c) *Service by publication.* — When service of the summons has been made by published notice, no judgment shall be entered on default until the plaintiff shall have filed a bond, approved by the court, conditioned to abide such order as the court may make touching the restitution of any property collected or obtained by virtue of the judgment in case a defense is thereafter permitted and sustained; provided, that in actions involving the title to real estate or to foreclose mortgages thereon or in actions in which the State of North Carolina or a county or municipality thereof is the plaintiff such bond shall not be required.

(d) *Setting aside default.* — For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b).

(e) *Plaintiffs, counterclaimants, cross claimants.* — The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a crossclaim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(f) *Judgment against the State of North Carolina.* — No judgment by default shall be entered against the State of North Carolina or an officer in his official capacity or agency thereof unless the claimant establishes his claim or right to relief by evidence. (1967, c. 954, s. 1; 1971, cc. 542, 1101; 1977, c. 675; 1991, c. 278, s. 1; 1993 (Reg. Sess., 1994), c. 733, s. 3.)

Editor's Note. —

Session Laws 1991, c. 278, s. 1, which amended subsection (c), was effective June 12, 1991, and was applicable to actions commenced on or after that date.

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective August 1, 1994, and applicable to civil actions commenced on or after that date, added the last sentence of subdivision (b)(2).

CASE NOTES

I. In General.
II. Entry of Default.
III. Entry of Judgment by Default.
  B. By Judge.
IV. Setting Aside Default.

I. IN GENERAL.

Applied in Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990); John Henry Spainhour & Sons Grading Co. v. Carolina E.E. Homes, Inc., 109 N.C. App. 174, 426 S.E.2d 728 (1993).

Cited in Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991); Jennings v. Jessen, 103 N.C. App. 739, 407 S.E.2d 264 (1991); O'Neal v. Murray, 105 N.C. App. 102, 411 S.E.2d 628 (1992).

II. ENTRY OF DEFAULT.

Interlocutory Entry of Default. — Where the trial court in its findings of fact referred to petitioner's "Motion for Entry of Default" and concluded that "the Clerk shall sign and file the Entry of Default, if not already signed and filed," and where the trial court then set for hearing a determination as to the money and property taken, damages caused, and "all other things" taken, the order entered by the trial court was not a final order or final judgment but was an interlocutory entry of default and not subject to appellate review. Duncan v. Duncan, 102 N.C. App. 107, 401 S.E.2d 398 (1991).

Defaults may not be entered after an answer has been filed, etc. —

According to the language of this section, defaults may not be entered after answer has been filed, even though the answer is late; however, a better reasoned and more equitable result may be reached by adhering to the principle that a default should not be entered, even though technical default is clear, if justice may be served otherwise. Fieldcrest Cannon Employees Credit Union v. Mabes, 116 N.C. App. 351, 447 S.E.2d 510 (1994).

Effect of Entry of Default. — The effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff's complaint and is prohibited from defending on the merits of the case. Spartan Leasing, Inc. v. Pollard, 101 N.C. App. 450, 400 S.E.2d 476 (1991).

Default Entered Properly. — Denial of the defendants' motion to set aside entry of default was not in error. RC Assocs. v. Regency Ventures, Inc., 111 N.C. App. 367, 432 S.E.2d 394 (1993).

III. ENTRY OF JUDGMENT BY DEFAULT.

B. By Judge.

When Judgment Must Be Entered by Judge. —

Where the claim is not for a sum certain or for a sum which can by computation be made certain, the party entitled to the default judgment must make his application to a judge. Grant v. Cox, 106 N.C. App. 122, 415 S.E.2d 378 (1992).

IV. SETTING ASIDE DEFAULT.

Attack of Default Judgment on Appeal. — Failure to attack default judgment at the trial court level precludes such an attack on appeal. University of N.C. v. Shoemate, 113 N.C. App. 205, 437 S.E.2d 892, cert. denied, 336 N.C. 615, 447 S.E.2d 413 (1994).

Party May Not Claim Judgment Is Defective After Accepting Its Benefits. — After petitioning the court to enter a default judgment, plaintiff relied upon its validity and force thrice — by executing on it; by retaining the money collected by execution; and by suing defendant in a separate action for future rents. The law does not permit a party to claim that a judgment is defective after relying upon its validity and accepting its benefits. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

An order reopening and enlarging a default judgment was erroneous because, by deciding to obtain a final judgment for the sum certain that was owed when the default judgment was entered, rather than to have the damages determined later by a trial, plaintiff waived any right it might have had to obtain judgment for a larger amount. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Superior court order which kept a default judgment in effect and permitted it to be enlarged from $7,039 to $35,857 was erroneous because the court had no authority to enter it. The order neither set aside the default judgment nor relieved plaintiff of it as authorized by this rule or § 1A-1, Rule 60(b), N.C.R.Civ.P. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Motion for Relief on Grounds of Insufficient Service. — In filing a motion to claim exempt property, which was inconsistent with her later motion for relief from judgment on the grounds of the invalidity of service of process, defendant made a general appearance, and her subsequent motion for relief from a default judgment on the grounds of the invalidity of service of process was properly dismissed. Faucette v. Dickerson, 103 N.C. App. 620, 406 S.E.2d 602 (1991).

Rule 56. Summary judgment.

Legal Periodicals. —

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

CASE NOTES

I. In General.
III. Propriety of Summary Judgment.
  A. In General.
  B. Particular Types of Actions, etc.
  C. Cases in Which Summary Judgment Held Proper.
  D. Cases in Which Summary Judgment Held Improper.
IV. Burden on Motion for Summary Judgment.
V. Function of Trial Court.
VI. Evidence on Motion.
  A. In General.
  B. Form of Affidavits and Other Evidence.

VIII. Time of Motion and Hearing.
IX. Notice.
X. Service and Filing of Affidavits.
XIII. Appeals.

I. IN GENERAL.

Conversion of § 1A-1, Rule 12(b)(6) and 12(c) Motions to Motions, etc. — In accord with ninth paragraph in main volume. See King v. Durham County Mental Health Developmental Disabilities & Substance Abuse Auth., 113 N.C. App. 341, 439 S.E.2d 771 (1994).

Summary Judgment for Nonmovant. — Although plaintiffs filed motion for summary judgment, trial court entered summary judgment for defendants. When appropriate, summary judgment may be rendered against the party moving for such judgment. Coulter v. City of Newton, 100 N.C. App. 523, 397 S.E.2d 244 (1990).

Pleadings Deemed Amended. — Where a motion for summary judgment is supported by matters outside the pleadings, the pleadings are deemed amended if in fact the issue not raised by the pleadings or by the motion for summary judgment is tried by the express or implied consent of both parties. County of Rutherford ex rel. Child Support Enforcement Agency ex rel. Hedrick v. Whitener, 100 N.C. App. 70, 394 S.E.2d 263 (1990).

Because the plaintiffs' summary judgment motion went only to liability, the trial court had the power to render summary judgment for the defendants with respect to liability notwithstanding the procedural defects in the defendants' summary judgment motion. Messer v. Laurel Hill Assocs., 102 N.C. App. 307, 401 S.E.2d 843 (1991).

Entry of Summary Judgment. — The mere filing of an affirmative defense without more is not sufficient to establish the absence of a justiciable issue, nor is the grant of a § 1A-1, Rule 12(b)(6) motion, nor the entry of summary judgment. These events may only be evidence of the absence of a justiciable issue. However, action by the losing party which perpetuated litigation in the fact of events substantially establishing that the pleadings no longer presented a justiciable controversy may also serve as evidence for purposes of § 6-21.5. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Distinction Between Motion to Dismiss and Summary Judgment. — The distinction between a § 1A-1, Rule 12(b)(6) motion to dismiss and a motion for summary judgment is more than a mere technicality. When considering a § 1A-1, Rule 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery. By contrast, when considering a summary judgment motion, the trial court must look at more than the pleadings; it must also consider additional matters such as affidavits, depositions and other specified matter outside the pleadings. Locus v. Fayetteville State Univ., 102 N.C. App. 522, 402 S.E.2d 862 (1991).

Ordinarily, findings of fact and conclusions of law are not required in the determination of a motion for summary judgment, and if these are made, they are disregarded on appeal. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Attorneys' Fees. — Section 6-21.5 provides in part that the entry of judgment pursuant to Rule 50 or this rule may be some evidence that an attorneys' fee may be warranted. The statute's reference to these rules, which are applicable only if evidence in addition to the pleadings is before the court, thus implies that when deciding whether to grant a motion under § 6-21.5 the trial court may consider evidence developed after the pleadings have been filed. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Applied in Pulley v. Rex Hosp., 326 N.C. 701, 392 S.E.2d 380 (1990); Barclays American/Leasing, Inc. v. North Carolina Ins. Guar. Ass'n, 99 N.C. App. 290, 392 S.E.2d 772 (1990); Kearney v. County of Durham, 99 N.C. App. 349, 393 S.E.2d 129 (1990); Lowry v. Lowry, 99 N.C. App. 246, 393 S.E.2d 141 (1990); Medley v. North Carolina Dep't of Cor., 99 N.C. App. 296, 393 S.E.2d 288 (1990); Jones Cooling & Heating, Inc. v. Booth, 99 N.C. App. 757, 394 S.E.2d 292 (1990); Raleigh Fed. Sav. Bank v. Godwin, 99 N.C. App. 761, 394 S.E.2d 294 (1990); Mozingo ex rel. Thomas v. Pitt County Mem. Hosp., 101 N.C. App. 578, 400 S.E.2d 747 (1991); Nisbet v. Nisbet, 102

N.C. App. 232, 402 S.E.2d 151 (1991); Spartan Leasing, Inc. v. Pollard, 101 N.C. App. 450, 400 S.E.2d 476 (1991); Rogers v. T.J.X. Cos., 329 N.C. 226, 404 S.E.2d 664 (1991); Easterwood v. Burge, 103 N.C. App. 507, 405 S.E.2d 787 (1991); Diorio v. Penny, 103 N.C. App. 407, 405 S.E.2d 789 (1991); Triad Bank v. Educational Consultants, Inc., 103 N.C. App. 483, 405 S.E.2d 800 (1991); Isbey v. Cooper Cos., 103 N.C. App. 774, 407 S.E.2d 254 (1991); Anders v. Hyundai Motor Am. Corp., 104 N.C. App. 61, 407 S.E.2d 618 (1991); Gray v. Small, 104 N.C. App. 222, 408 S.E.2d 538 (1991); Safety Mut. Cas. Corp. v. Spears, 104 N.C. App. 467, 409 S.E.2d 736 (1991); Rose v. Steen Cleaning, Inc., 104 N.C. App. 539, 410 S.E.2d 221 (1991); Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992); Roumillat v. Simplistic Enters., Inc., 331 N.C. 57, 414 S.E.2d 339 (1992); Lenzer v. Flaherty, 106 N.C. App. 496, 418 S.E.2d 276 (1992); Whiteside v. Lawyers Sur. Corp., 107 N.C. App. 230, 418 S.E.2d 829 (1992); Thomco Realty, Inc. v. Helms, 107 N.C. App. 224, 418 S.E.2d 834 (1992); Catawba County Horsemen's Ass'n v. Deal, 107 N.C. App. 213, 419 S.E.2d 185 (1992); Canady v. Mann, 107 N.C. App. 252, 419 S.E.2d 597 (1992); Goodman v. Wenco Foods, Inc., 331 N.C. 1, 423 S.E.2d 444 (1992); Kirkland v. National Civic Assistance Group, Inc., 108 N.C. App. 326, 423 S.E.2d 822 (1992); AT & T Family Fed. Credit Union v. Beaty Wrecker Serv., Inc., 108 N.C. App. 611, 425 S.E.2d 427 (1993); McMurry v. Cochrane Furn. Co., 109 N.C. App. 52, 425 S.E.2d 735 (1993); Smith v. State Farm Fire & Cas. Co., 109 N.C. App. 276, 426 S.E.2d 457 (1993); Wachovia Bank & Trust Co. v. Templeton Oldsmobile-Cadillac-Pontiac, Inc., 109 N.C. App. 352, 427 S.E.2d 629 (1993); Cowan v. Brian Ctr. Mgt. Corp., 109 N.C. App. 443, 428 S.E.2d 263 (1993); United States v. 1501 W. Blvd., 814 F. Supp. 468 (W.D.N.C. 1993); Holloway v. Wachovia Bank & Trust Co., 109 N.C. App. 403, 428 S.E.2d 453 (1993); Dickens v. Thorne, 110 N.C. App. 39, 429 S.E.2d 176 (1993); Jefferson-Pilot Life Ins. Co. v. Spencer, 110 N.C. App. 194, 429 S.E.2d 583 (1993); Reece v. Homette Corp., 110 N.C. App. 462, 429 S.E.2d 768 (1993); APAC-Carolina, Inc. v. Greensboro-High Point Airport Auth., 110 N.C. App. 664, 431 S.E.2d 508 (1993); State ex rel. State Art Museum Bldg. Comm'n v. Travelers Indem. Co., 111 N.C. App. 330, 432 S.E.2d 419 (1993); L.B. Best Furn. Distribs., Inc. v. Capital Delivery Serv., Inc., 111 N.C. App. 405, 432 S.E.2d 437 (1993); Morgan v. Cavalier Acquisition Corp., 111 N.C. App. 520, 432 S.E.2d 915 (1993); Berkeley Fed. Sav. & Loan Ass'n v. Terra Del Sol, Inc., 111 N.C. App. 692, 433 S.E.2d 449 (1993); Butz v. Holder, 112 N.C. App. 116, 434 S.E.2d 862 (1993); Miller v. Talton, 112 N.C. App. 484, 435 S.E.2d 793 (1993); Gregory v. Floyd, 112 N.C. App. 470, 435 S.E.2d 808 (1993); Phelps v. Vassey, 113 N.C. App. 132, 437 S.E.2d 692 (1993); First Citizens Bank & Trust Co. v. McLamb, 112 N.C. App. 645, 439 S.E.2d 166 (1994); Varner v. Bryan, 113 N.C. App. 697 440 S.E.2d 295 (1994); McKeithan v. CSX Transp., Inc., 113 N.C. App. 818, 440 S.E.2d 312 (1994); DOT v. Idol, 114 N.C. App. 98, 440 S.E.2d 863 (1994); Dunleavy v. Yates Constr. Co., 114 N.C. App. 196, 442 S.E.2d 53 (1994); Coffin v. ISS Oxford Servs., Inc., 114 N.C. App. 802, 443 S.E.2d 352 (1994); Weber v. Holland, 115 N.C. App. 160, 443 S.E.2d 746 (1994); Felts v. Hoskins, 115 N.C. App. 715, 446 S.E.2d 110 (1994); McCorkle v. Aeroglide Corp., 115 N.C. App. 651, 446 S.E.2d 145 (1994); Canady v. McLeod, 116 N.C. App. 82, 446 S.E.2d 879 (1994); Kennedy v. Guilford Technical Community College, 115 N.C. App. 581, 448 S.E.2d 280 (1994); Echols v. Zarn, Inc., 116 N.C. App. 364, 448 S.E.2d 289 (1994); Top Line Constr. Co. v. J.W. Cook & Sons, 118 N.C. App. 429, 455 S.E.2d 463 (1995); First Healthcare Corp. v. Rettinger, 118 N.C. App. 600, 456 S.E.2d 347 (1995).

Quoted in Muther-Ballenger v. Giffin Elec. Consultants, Inc., 100 N.C. App. 505, 397 S.E.2d 247 (1990); Busby v. Simmons, 103 N.C. App. 592, 406 S.E.2d 628 (1991); Mitchell v. Golden, 107 N.C. App. 413, 420 S.E.2d 482 (1992); Eury v. Nationwide Mut. Ins. Co., 109 N.C. App. 303, 426 S.E.2d 442 (1993); Beavers v. Federal Ins. Co., 113 N.C. App. 254, 437 S.E.2d 881, cert. denied, 336 N.C. 602, 447 S.E.2d 384 (1994); Andersen v. Baccus, 335 N.C. 526, 439 S.E.2d 136 (1994); Universal Leaf Tobacco Co. v. Oldham, 113 N.C. App. 490, 439 S.E.2d 179 (1994); Lavelle v. Guilford County Area Mental Illness, Mental Retardation & Substance Abuse Auth., 115 N.C. App. 75, 443 S.E.2d 761 (1994); McLeod v. Nationwide Mut. Ins. Co., 115 N.C. App. 283, 444 S.E.2d 487, cert. denied, 337 N.C. 694, 448 S.E.2d 528 (1994); Jordan v. Foust Oil Co., 116 N.C. App. 155, 447 S.E.2d 491 (1994), cert. denied, 339 N.C. 613, 454 S.E.2d 252 (1995); Collins Coin

Music Co. v. North Carolina ABC Comm'n, 117 N.C. App. 405, 451 S.E.2d 306 (1994); Dunes S. Homeowners Ass'n v. First Flight Bldrs., Inc., 117 N.C. App. 360, 451 S.E.2d 636 (1994).

Stated in Bass v. North Carolina Farm Bureau Mut. Ins. Co., 100 N.C. App. 728, 398 S.E.2d 47 (1990); Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487 (1992); Watson Elec. Constr. Co. v. City of Winston-Salem, 109 N.C. App. 194, 426 S.E.2d 420 (1993); Glover v. First Union Nat'l Bank, 109 N.C. App. 451, 428 S.E.2d 206 (1993); Courts v. Annie Penn Mem. Hosp., 111 N.C. App. 134, 431 S.E.2d 864 (1993); Hales v. North Carolina Ins. Guar. Ass'n, 111 N.C. App. 892, 433 S.E.2d 468 (1993); Thrift v. Food Lion, Inc., 111 N.C. App. 758, 433 S.E.2d 481 (1993); Liggett Group, Inc. v. Sunas, 113 N.C. App. 19, 437 S.E.2d 674 (1993); New S. Ins. Co. v. Kidd, 114 N.C. App. 749, 443 S.E.2d 85 (1994); Mickles v. Duke Power Co., 115 N.C. App. 624, 446 S.E.2d 369, cert. granted, 338 N.C. 311, 450 S.E.2d 488 (1994); Nicholson v. County of Onslow, 116 N.C. App. 439, 448 S.E.2d 140 (1994).

Cited in United Carolina Bank v. Tucker, 99 N.C. App. 95, 392 S.E.2d 410 (1990); Kaplan v. First Union Nat'l Bank, 99 N.C. App. 570, 393 S.E.2d 344 (1990); Yates Constr. Co. v. Greenleaf Corp., 99 N.C. App. 489, 393 S.E.2d 563 (1990); Stallings v. Gunter, 99 N.C. App. 710, 394 S.E.2d 212 (1990); Stegall v. Stegall, 100 N.C. App. 398, 397 S.E.2d 306 (1990); Brooks v. Hackney, 100 N.C. App. 562, 397 S.E.2d 361 (1990); Harroff v. Harroff, 100 N.C. App. 686, 398 S.E.2d 340 (1990); Medlin v. Bass, 327 N.C. 587, 398 S.E.2d 460 (1990); Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 398 S.E.2d 628 (1990); Raritan River Steel Co. v. Cherry, Bekaert & Holland, 101 N.C. App. 1, 398 S.E.2d 889 (1990); Dale v. Town of Columbus, 101 N.C. App. 335, 399 S.E.2d 350 (1991); Bell Arthur Water Corp. v. DOT, 101 N.C. App. 305, 399 S.E.2d 353 (1991); Whittington v. North Carolina Dep't of Human Resources, 100 N.C. App. 603, 398 S.E.2d 40 (1990); Suarez v. Food Lion, Inc., 100 N.C. App. 700, 398 S.E.2d 60 (1990); HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990); Commonwealth Land Title Ins. Co. v. Stephenson, 101 N.C. App. 379, 399 S.E.2d 380 (1991); Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921 (1991); Raritan River Steel Co. v. Cherry, Bekaert & Holland, 329 N.C. 646, 407 S.E.2d 178 (1991); Vulcan Materials Co. v. Iredell County, 103 N.C. App. 779, 407 S.E.2d 283 (1991); North Carolina R.R. v. Ferguson Bldrs. Supply, 103 N.C. App. 768, 407 S.E.2d 296 (1991); Pulliam v. City of Greensboro, 103 N.C. App. 748, 407 S.E.2d 567 (1991); Toms v. Lawyers Mut. Liab. Ins. Co., 104 N.C. App. 88, 408 S.E.2d 206 (1991); Yates v. Haley, 103 N.C. App. 604, 406 S.E.2d 659 (1991); Salt v. Applied Analytical, Inc., 104 N.C. App. 652, 412 S.E.2d 97 (1991); Howell v. Town of Carolina Beach, 106 N.C. App. 410, 417 S.E.2d 277 (1992); IRA ex rel. Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354 (1992); Pendergrass v. Card Care, Inc., 333 N.C. 233, 424 S.E.2d 391 (1993); Black v. Western Carolina Univ., 109 N.C. App. 209, 426 S.E.2d 733 (1993); Munie v. Tangle Oaks Corp., 109 N.C. App. 336, 427 S.E.2d 149 (1993); Keene Convenient Mart, Inc. v. SSS Band Backers, 109 N.C. App. 384, 427 S.E.2d 322 (1993); Foster v. Federal Emergency Mgt. Agency, 984 F.2d 128 (4th Cir. 1993); Delta Marine, Inc. v. Whaley, 813 F. Supp. 414 (E.D.N.C. 1993); Boyd v. Nationwide Mut. Ins. Co., 108 N.C. App. 536, 424 S.E.2d 168 (1993); Gibson v. Hunsberger, 109 N.C. App. 671, 428 S.E.2d 489 (1993); Cherry v. Harris, 110 N.C. App. 478, 429 S.E.2d 771 (1993); Nationwide Mut. Ins. Co. v. Anderson, 111 N.C. App. 248, 431 S.E.2d 552 (1993); Swain v. Leahy, 111 N.C. App. 884, 433 S.E.2d 460 (1993); Huffaker v. Holley, 111 N.C. App. 914, 433 S.E.2d 474 (1993); Gardner v. Gardner, 334 N.C. 662, 435 S.E.2d 324 (1993); Nationwide Mut. Ins. Co. v. Public Serv. Co., 112 N.C. App. 345, 435 S.E.2d 561 (1993); Alt v. Parker, 112 N.C. App. 307, 435 S.E.2d 773 (1993); Wilkinson v. SRW/Cary Assocs., 112 N.C. App. 846, 437 S.E.2d 3 (1993); Padgett v. J.C. Penney Co., 112 N.C. App. 842, 437 S.E.2d 401 (1993); University of N.C. v. Shoemate, 113 N.C. App. 205, 437 S.E.2d 892, cert. denied, 336 N.C. 615, 447 S.E.2d 413 (1994); Adams v. Jones, 114 N.C. App. 256, 441 S.E.2d 699 (1994); Crowell Constructors, Inc. v. State ex rel. Cobey, 114 N.C. App. 75, 440 S.E.2d 848 (1994); State Farm Mut. Auto. Ins. Co. v. Branch, 114 N.C. App. 234, 441 S.E.2d 586 (1994); Powell v. S & G Prestress Co., 114 N.C. App. 319, 442 S.E.2d 143 (1994); Williams v. Paley, 114 N.C. App. 571, 442 S.E.2d 558 (1994); Kraft Foodservice, Inc. v. Hardee, 114 N.C. App. 811, 443 S.E.2d 106

(1994); State Farm Mut. Auto. Ins. Co. v. Young, 115 N.C. App. 68, 443 S.E.2d 756, cert. granted, 338 N.C. 523, 453 S.E.2d 168 (1994); Tharrington v. Sturdivant Life Ins. Co., 115 N.C. App. 123, 443 S.E.2d 797 (1994); Dublin v. UCR, Inc., 115 N.C. App. 209, 444 S.E.2d 455, appeal dismissed and cert. denied, — N.C. —, 449 S.E.2d 569 (1994); Zenns v. Hartford Accident & Indem. Co., 115 N.C. App. 482, 444 S.E.2d 692, cert. denied, 337 N.C. 699, 448 S.E.2d 541 (1994); Hales v. North Carolina Ins. Guar. Ass'n, 337 N.C. 329, 445 S.E.2d 590 (1994); Capital Outdoor Adv., Inc. v. City of Raleigh, 337 N.C. 150, 446 S.E.2d 289, rehearing denied, 337 N.C. 807, 449 S.E.2d 566 (1994); Adams v. Beard Dev. Corp., 116 N.C. App. 105, 446 S.E.2d 862 (1994); Peace River Elec. Coop. v. Ward Transformer Co., 116 N.C. App. 493, 449 S.E.2d 202 (1994), cert. denied, 339 N.C. 739, 454 S.E.2d 655 (1995); Miller v. Miller, 117 N.C. App. 71, 450 S.E.2d 15 (1994); Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994); Maryland Cas. Co. v. Smith, 117 N.C. App. 593, 452 S.E.2d 318 (1995); State ex rel. Cobey v. Cook, 118 N.C. App. 70, 453 S.E.2d 553 (1995); Taylor v. Brinkman, 118 N.C. App. 96, 453 S.E.2d 560 (1995); Talton v. Mac Tools, Inc., 118 N.C. App. 87, 453 S.E.2d 563 (1995); Stewart v. Kopp, 118 N.C. App. 161, 454 S.E.2d 672, cert. denied, 340 N.C. 263, 456 S.E.2d 838 (1995); James v. Clark, 118 N.C. App. 178, 454 S.E.2d 826 (1995); Babb v. Harnett County Bd. of Educ., 118 N.C. App. 291, 454 S.E.2d 833 (1995); Vanburen County Dep't of Social Servs. ex rel. Swearengin v. Swearengin, 118 N.C. App. 324, 455 S.E.2d 161 (1995); Eastern Appraisal Servs., Inc. v. State, 118 N.C. App. 692, 457 S.E.2d 312 (1995).

III. PROPRIETY OF SUMMARY JUDGMENT.

A. In General.

Especially in Negligence Cases. — Although North Carolina appellate courts have consistently held that summary judgment is rarely appropriate in negligence actions, summary judgment should be entered where the forecast of evidence before the trial court demonstrates that a plaintiff cannot support an essential element of his claim. Thus, summary judgment was appropriate in action arising from automobile collision. Patterson v. Pierce, 115 N.C. App. 142, 443 S.E.2d 770, cert. denied, 337 N.C. 803, 449 S.E.2d 749 (1994).

Summary Judgment to Be Granted Only Where No Genuine Issue of Material Fact Is Presented. — Evidence held insufficient to establish any genuine issue of material fact. Long v. Vertical Technologies, Inc., 113 N.C. App. 598, 439 S.E.2d 797 (1994).

And Where a Party Is Entitled to Judgment, etc. — In accord with first paragraph in main volume. See Vance v. Wiley T. Booth, Inc., 112 N.C. App. 600, 436 S.E.2d 256 (1993); Padgett v. J.C. Penney Co., 112 N.C. App. 842, 437 S.E.2d 401 (1993).

The failure of the defendant to plead res judicata is not a bar to that issue being raised at hearing on summary judgment. County of Rutherford ex rel. Child Support Enforcement Agency ex rel. Hedrick v. Whitener, 100 N.C. App. 70, 394 S.E.2d 263 (1990).

When defendant establishes a complete defense, etc. — A defending party is entitled to summary judgment if it can establish that no claim for relief exists or that the claimant cannot overcome an affirmative defense or legal bar to the claim. Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

Plaintiff's bare assertions, etc. — Where plaintiff made a motion for summary judgment, which was denied, and later plaintiff filed a second motion for summary judgment involving the same issue as presented by the initial motion, the trial court erred by granting plaintiff's second motion for summary judgment. Taylorsville Fed. Savs. & Loan Ass'n v. Keen, 110 N.C. App. 784, 431 S.E.2d 484 (1993).

B. Particular Types of Actions, etc.

Termination of Parental Rights. — Article 24B of Chapter 7A (§ 7A-289.22 et seq.) does not provide for a summary proceeding to determine whether the petitioner has proven the existence of one or more of the grounds for termination. Thus, the trial court erred in granting petitioners' motion for partial summary judgment. Curtis v. Curtis, 104 N.C. App. 625, 410 S.E.2d 917 (1991).

Assignments. — Generally, the interpretation of an assignment is governed by rules applicable to the interpretation of a contract. If there is no ambiguity regarding the subject matter of the assignment, the plaintiff's intent can be interpreted without resort to extrinsic evidence and summary judgment may be appropriate. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Shareholders' Derivative Actions. — For a case discussing interplay of rules and statutes governing procedure and discovery in shareholders' derivative action, particularly with respect to former § 55-55(c) (see now § 55-7-40(d)), this rule, and § 1A-1, Rules 12 and 23, see Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Lack of Verification Pursuant to § 1A-1, Rule 23(b). — Because the verification requirement in § 1A-1, Rule 23(b) is not jurisdictional in nature, where the purposes behind the rule have been fulfilled by the time the objection to a defective or absent verification is lodged, dismissal or summary judgment in favor of defendants is not appropriate. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

C. Cases in Which Summary Judgment Held Proper.

Libel Claim. — Trial court did not err in granting defendants' motion for summary judgment on plaintiffs' libel claim. Martin Marietta Corp. v. Wake Stone Corp., 111 N.C. App. 269, 432 S.E.2d 428 (1993), aff'd, 339 N.C. 602, 453 S.E.2d 146 (1995).

Intentional Infliction of Emotional Distress. — Where one plaintiff could place no time period in which defendant allegedly intentionally inflicted emotional distress, and where she was unable to place a day, month or year on any of the specific events she alleged, there was simply no evidence to indicate that any of the alleged incidents regarding plaintiff took place within the three-year statute of limitations period, and the trial court did not err in granting summary judgment to defendant against that plaintiff. Waddle v. Sparks, 100 N.C. App. 129, 394 S.E.2d 683 (1990), modified on other grounds, 331 N.C. 73, 412 S.E.2d 22 (1992).

Action to Quiet Title Based on Fraud. — Where the cause of action is in fraud, the defendants would have a basic right to a jury trial. However, judge in action to quiet title based on fraud and on construction of deed considered only the intent of the parties in the deed in question and did not reach the issue of fraud. Once the intent was determined from the four corners of the deed, "fraud" no longer mattered and no jury trial was necessary; therefore, the judge was able to dispose of the case on a judgment on the pleadings. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Conspiracy. — Summary judgment proper where plaintiff did not obtain the right to be valedictorian and offered nothing beyond bare assertions that defendants engaged in some conspiracy to keep her from attaining the position. Townsend v. Board of Educ., 118 N.C. App. 302, 454 S.E.2d 817 (1995).

D. Cases in Which Summary Judgment Held Improper.

Deed of Trust. — Where there was a genuine issue of fact as to the extent to which deed of trust secured amounts additional to purchase price of shopping center property summary judgment was improper. Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994).

Automobile Accident. — In action for damages arising out of automobile accident, trial court erred in granting defendant's motion for summary judgment. Mobley v. Estate of Johnson, 111 N.C. App. 422, 432 S.E.2d 425 (1993).

In an action for constructive fraud and constructive trust, summary judgment for defendant attorney was precluded by a genuine issue of material fact as to the existence of an attorney-client relationship at the time a referral fee arrangement was made. Booher v. Frue, 98 N.C. App. 585, 392 S.E.2d 105 (1990).

Intentional Infliction of Emotional Distress. — Where plaintiff's allegations were sufficient to establish that defendant's behavior constituted more than insults or unflattering opinions the trial court erred in granting summary judgment in favor of defendant with regard to suit alleging intentional inflictions of emotional distress, as there were sufficient facts alleged to raise a question of whether defendant's conduct was extreme and outrageous. Waddle v. Sparks, 100 N.C. App. 129, 394 S.E.2d 683 (1990).

Libel and Slander. — There was ample evidence to withstand summary judgment in the record of libel and slander case that defendant's statement was false and made with actual malice; defendant's firing of plaintiff within days after newspaper published a letter from plaintiff's mother in support of defendant's political opponent, and the vehement character of the statement to the newspaper were some evidence of defendant's ill-will toward plaintiff. Plaintiff also introduced evidence that he was competent at his job as assistant district attorney. Clark v. Brown, 99 N.C. App. 255, 393 S.E.2d 134 (1990).

Evidence Sufficient to Send Claim to Jury. — Where a jury could have concluded from the evidence that defendant knew with substantial certainty that its continued use of only body-belts and pole straps as safety equipment, as opposed to alternative apparatus or fall arrest measures, would inevitably result in death or serious bodily injury, because plaintiff presented evidence sufficient to send her claim to the jury, the order of summary judgment was improper. Mickles v. Duke Power Co., 115 N.C. App. 624, 446 S.E.2d 369, cert. granted, 338 N.C. 311, 450 S.E.2d 488 (1994).

Summary judgment was improper where plaintiffs forecast evidence that purchasing corporation was a "mere continuation" of the old corporation. Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994), cert. denied, 339 N.C. 736, 454 S.E.2d 647 (1995).

Mitigation of Damages. — Defendant's affidavit presented a genuine issue of material fact as to the adequacy of plaintiff's attempted mitigation of damages; therefore, the trial court incorrectly granted summary judgment on the issue of damages. RC Assocs. v. Regency Ventures, Inc., 111 N.C. App. 367, 432 S.E.2d 394 (1993).

Piercing the Corporate Veil. — Because only one of several factors that can justify a court in piercing the corporate veil and treating a corporation as the alter ego of its officers or stockholders was established without contradiction by the materials in the record, the court correctly denied plaintiff's motion for summary judgment on the issue of piercing the corporate veil. Hoots v. Toms & Bazzle, 100 N.C. App. 412, 396 S.E.2d 820 (1990).

Contributory Negligence of Paper Mill Operator. — Genuine issues of fact, precluding summary judgment, existed as to whether a paper mill owner was contributorily negligent in operating a continuous digester system which the owner alleged had been improperly designed and installed by the system's manufacturer. Federal Paper Bd. Co. v. Kamyr, Inc., 101 N.C. App. 329, 399 S.E.2d 411 (1991), discretionary review denied, 328 N.C. 570, 403 S.E.2d 510 (1991).

IV. BURDEN ON MOTION FOR SUMMARY JUDGMENT.

Movant Shifted Burden by Showing Opponent Lacked Standing. — Because defendant met its summary judgment burden by showing that there was no genuine issue of material fact due to lack of standing, the burden shifted to plaintiff. Landfall Group Against Paid Transferability v. Landfall Club, Inc., 117 N.C. App. 270, 450 S.E.2d 513 (1994).

Showing That Opponent Cannot Produce Evidence to Support Its Claim Satisfies Burden. —

To succeed in a summary judgment motion, the movant has the burden of showing, based on pleadings, depositions, answers, admissions, and affidavits, there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Defendant may meet this burden by showing either (1) an essential element of the nonmovant's claim is nonexistent, (2) the nonmovant cannot produce evidence to support an essential element of his claim, (3) or the nonmovant cannot surmount an affirmative defense which would bar his claim. Taylor v. Ashburn, 112 N.C. App. 604, 436 S.E.2d 276 (1993), cert. denied, 336 N.C. 77, 445 S.E.2d 45 (1994).

V. FUNCTION OF TRIAL COURT.

As a Summary of Undisputed Facts, etc. —

Orders granting summary judgment under this rule do not normally contain detailed findings of fact. However, if the findings of fact are actually the trial court's summation of the undisputed facts which support the judgment, findings of fact and conclusions of law do not render a summary judgment void or voidable. Noel Williams Masonry, Inc. v. Vision Contractors, 103 N.C. App. 597, 406 S.E.2d 605 (1991).

VI. EVIDENCE ON MOTION.

A. In General.

Where the record did not show that plaintiff objected to parol evidence in the form of affidavits submitted by the defendants, the facts set out in these affidavits were competent evidence to be considered by the trial court in ruling upon motions for summary judgment. Lindsey v. North Carolina Farm Bureau Mut. Ins. Co., 103 N.C. App. 432, 405 S.E.2d 803 (1991).

Prima Facie Evidence of Negligent Supervision. — Plaintiff's forecast of evidence was sufficient to demonstrate that she could make out a prima facie case of negligent supervision. Rouse v. Pitt County Mem. Hosp., 116 N.C. App. 241, 447 S.E.2d 505 (1994), cert. granted, 339 N.C. 615, 454 S.E.2d 257 (1995).

Failure to Object to Affidavits. — Even if affidavits of two defendants contained evidence of settlement negotiations made inadmissible by § 8C-1, Rule 408, plaintiff could not assert their admission as error on appeal where plaintiff failed to object or move to strike the affidavits. Lindsey v. North Carolina Farm Bureau Mut. Ins. Co., 103 N.C. App. 432, 405 S.E.2d 803 (1991).

B. Form of Affidavits and Other Evidence.

Where Requirements of Section (e) Are Met. —

Affidavits used by either party must comply with the requirements of this rule, that is, they must be based on personal knowledge, must set forth facts which would be admissible in evidence, and must show that the affiant is competent to testify to the matters stated in the affidavit. Taylor v. Taylor Prods. Inc., 105 N.C. App. 620, 414 S.E.2d 568 (1992), overruled on other grounds, 334 N.C. 303, 432 S.E.2d 347 (1993).

VIII. TIME OF MOTION AND HEARING.

Hearing on Motion While Discovery Is Pending, etc. —

In accord with the main volume. See Kirkhart v. Saieed, 107 N.C. App. 293, 419 S.E.2d 580 (1992).

IX. NOTICE.

Noncompliance with subsection (c) of this rule may be waived by the person entitled to the notice. Messer v. Laurel Hill Assocs., 102 N.C. App. 307, 401 S.E.2d 843 (1991).

The person entitled to notice pursuant to subsection (c) of this rule waives it when he participates in the hearing but does not object to the improper notice. Messer v. Laurel Hill Assocs., 102 N.C. App. 307, 401 S.E.2d 843 (1991).

Waiver of Notice. — The notice required by this rule may be waived by participation in the hearing and by a failure to object to the lack of notice or failure to request additional time by the non-moving party. Patrick v. Ronald Williams, Professional Ass'n, 102 N.C. App. 355, 402 S.E.2d 452 (1991).

No reversible error where defendants not prejudiced by untimely notice. — Trial court did not commit reversible error in granting summary judgment in favor of plaintiff although plaintiff failed to give timely notice to appellants of said motion pursuant to § 1A-1, Rule 6(e) and section (c) of this rule. Plaintiff conceded that the Notice of the Summary Judgment Hearing was served by mail only nine days prior to the hearing instead of 13 days as required; however, defendants failed to demonstrate any prejudice caused them by the untimely notice. Symons Corp. v. Quality Concrete Constr., Inc., 108 N.C. App. 17, 422 S.E.2d 365 (1992).

X. SERVICE AND FILING OF AFFIDAVITS.

Failure to File Opposing Affidavits Prior to Day of Hearing. — This rule specifically provides that the moving party is required to submit supporting affidavits which would set forth the moving party's basis for the motion and that opposing affidavits should be filed prior to the day of the hearing. Where plaintiff did not attempt to present opposing affidavits until the day of the hearing, her argument that she was not required to respond to defendant's motion for summary judgment until defendant had carried out his burden and the basis for his motion became clear was meritless. Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

When Filing on Date of Hearing Permitted. — Despite the specific language of section (c) of this rule requiring affidavits to be filed prior to the day of hearing, the trial court may in some instances permit the filing of the affidavits at a later time. If a request for permission to file affidavits at some later time is made before the date of the summary judgment hearing, the trial court may in its discretion order the period for filing affidavits to be enlarged. Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

If a request for permission to file affidavits in support of a motion under this rule is made on the day of the summary judgment hearing, the trial court may permit the act to be done where the failure to act was the result of excusable neglect. Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

Where there was no request for enlargement of time within which to file and serve any affidavits made by the plaintiff prior to the day of the hearing of the motion on summary judgment and there was no finding or a request by the plaintiff for a finding of excusable neglect in failing to serve the affidavits prior to that date, because the plaintiff failed to proceed in a manner that would permit the trial court to exercise its discretion to permit the filing of plaintiff's proffered affidavit, the plaintiff could not on appeal complain about its exclusion. Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

XIII. APPEALS.

Order Setting Aside Summary Judgment Is Interlocutory. —

The denial of a motion for summary judgment is interlocutory and nonappealable unless a substantial right of one of the parties is involved. Denegar v. City of Charlotte, 115 N.C. App. 166, 443 S.E.2d 778 (1994).

Rule 57. Declaratory judgments.

CASE NOTES

Applied in Alphatronix, Inc. v. Pinnacle Micro, Inc., 814 F. Supp. 455 (M.D.N.C. 1993).

Rule 58. Entry of judgment.

Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. Service and proof of service shall be in accordance with Rule 5. If service is by mail, three days shall be added to the time periods prescribed by Rule 50(b), Rule 52(b), and Rule 59. All time periods within which a party may further act pursuant to Rule 50(b), Rule 52(b), or Rule 59 shall be tolled for the duration of any period of noncompliance with this service requirement, provided however that no time period under Rule 50(b), Rule 52(b), or Rule 59 shall be tolled longer than 90 days from the date the judgment is entered. Consent for the signing and entry of a judgment out of term, session, county, and district shall be deemed to have been given unless an express objection to such action was made on the record prior to the end of the term or session at which the matter was heard.

Notwithstanding any other law to the contrary, any judgment entered by a magistrate in a small claims action pursuant to Article 19 of Chapter 7A shall be entered in accordance with this Rule except judgments announced and signed in open court at the conclusion of a trial are considered to be served on the parties, and copies of any judgment not announced and signed in open court at the conclusion of a trial shall be served by the magistrate on all parties in accordance with this Rule, within three days after the judgment is entered. If service is by mail, three days shall be added to the time periods prescribed by G.S. 7A-228. All time periods within which a party may further act pursuant to G.S. 7A-228 shall be tolled for the duration of any period of noncompliance of this service requirement, provided that no time period shall be tolled longer than 90 days from the date judgment is entered. (1967, c. 954, s. 1; 1993 (Reg. Sess., 1994), c. 594, s. 1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 594, s. 1, which rewrote this section, was effective October 1, 1994, and was applicable to all judgments subject to entry on or after that date.

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, and applicable to all judgments subject to entry on or after that date, rewrote this section.

CASE NOTES

Requirements for Completed Entry of Judgment. — Paragraph three of this rule specifies three separate events which must occur before entry of judgment is complete. First, the clerk must receive an order from the trial judge for the entry of judgment. Second, the judgment must be filed. Third, the clerk must mail notice of filing to all parties. Darcy v. Osborne, 101 N.C. App. 546, 400 S.E.2d 95 (1991).

Contrary Direction. — An instruction by the court that the prevailing party's attorney is to draft the order is a contrary direction. Therefore, because of the trial court's contrary direction, the automatic entry provisions of paragraph one of this rule do not operate to determine when entry of judgment occurred. In re Hayes, 106 N.C. App. 652, 418 S.E.2d 304 (1992).

It is essential that the notation of entry of judgment include at least the names of the parties, the prevailing party, the relief awarded, and the date the verdict was returned. The notation here lacks these specifics and is therefore insufficient to constitute entry of judgment under Rule 58. Reed v. Abrahamson, 331 N.C. 249, 415 S.E.2d 549 (1992).

Inadequate Notation. — In order to make a notation of "such verdict" as was returned in this case, the clerk had to specify more than the mere words "jury verdict." An adequate notation would have reflected much of the information on the actual jury verdict form, including, at minimum, the names of the parties, the prevailing party, the relief awarded, and the date the verdict was returned. Reed v. Abrahamson, 331 N.C. 249, 415 S.E.2d 549 (1992).

Announcement in Open Court Is Not Entry of Judgment. — Announcement of judgment in open court merely constitutes the rendition of judgment, not its entry; the court of appeals has no authority to hear an appeal where there has been no entry of judgment. In re Estate of Walker, 113 N.C. App. 419, 438 S.E.2d 426 (1994).

Judgment Deemed Entered. — Where the trial judge announced his ruling in open court, which ruling was noted without instruction by the court, in the minutes by the clerk of court, in early April, and where the trial judge signed the written order that had been drafted by respondent's counsel at the end of the month, the order was deemed entered when the judge signed the written order. Cobb v. Rocky Mount Bd. of Educ., 102 N.C. App. 681, 403 S.E.2d 538 (1991), aff'd, 331 N.C. 280, 415 S.E.2d 554 (1992).

Appeal Dismissed in Absence of Record of Notice. — Where a judgment was prepared and filed in this case but there was no evidence in the record on appeal that notice of filing was mailed to the parties and the judgment does not exhibit a time of mailing constituting prima facie evidence of mailing notice, judgment was not properly entered and appeal was dismissed for lack of jurisdiction. Darcy v. Osborne, 101 N.C. App. 546, 400 S.E.2d 95 (1991).

Judgment Incomplete for Purposes of Appeal Until Entry. — Not only does the trial court have the authority to subsequently enter a written judgment which conforms to its rendered judgment, entry of judgment by the trial court is the event which vests jurisdiction in the appellate court, and the judgment is not complete for the purpose of appeal until its entry. In accord with 1993 Cumulative Supplement. In re Estate of Walker, 113 N.C. App. 419, 438 S.E.2d 426 (1994).

Notice of appeal given after the general terms of the judgment are announced in open court is, alone, not sufficient to vest jurisdiction in the appellate court. Searles v. Searles, 100 N.C. App. 723, 398 S.E.2d 55 (1990).

Where the jury announced its verdict in open court, it "rendered judgment" according to § 1A-1, Rule 3(a) and this rule, and oral notice of appeal was a proper procedure. Stimpson Hosiery Mills, Inc. v. Pam Trading Corp., 98 N.C. App. 543, 392 S.E.2d 128 (1990).

Factors in Analysis of Whether an Entry of Judgment Has Occurred. —

The language of this rule clearly establishes that entry of judgment occurs when the clerk makes some notation in the minutes. In cases where the procedures used do not fit within the express provisions of the rule or where there is no evidence to indicate when or whether such notation was made, the spirit and purpose of the rule should determine when entry of judgment occurs. Relevant factors in this analysis are: (1) an easily identifiable point at which entry occurred, such that (2) the parties have fair notice of the court's judgment and the time thereof, and that (3) the matters for adjudication have been finally and completely resolved so that the case is suitable for appellate review. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Interrelationship Between Rules. — The importance of finality to the timing of entry of judgment is apparent more from the interrelationship between § 1A-1, Rule 54 and this rule than from the express language of this rule itself. The principal concern regarding finality is that all matters for determination be resolved. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Rendering of Judgment Held Not Entry of Judgment. — In a custody case, where the trial court announced in open court that the previous decree would receive full faith and credit and custody would not change, the court rendered judgment that day on the custody issue, but the court did not enter judgment, as the court directed counsel for defendant to draw the order and the parties continued to negotiate on visitation so the rendering of judgment did not constitute entry of judgment. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Entry of judgment occurred when the trial court adopted and signed the proposed judgment submitted by plaintiff's counsel, not when the jury returned its verdict and the assistant clerk wrote "jury verdict" on the court calendar. Reed v. Abrahamson, 331 N.C. 249, 415 S.E.2d 549 (1992).

Adoption of Draft Order and Proposed Findings. — In a custody case, where trial court directed counsel for defendant to draft an order reflecting its decision, this order required findings of fact supporting the court's conclusion that there had been no material change of circumstances warranting a modification of the custody order. Fair notice concerns would dictate that entry of judgment occurred when the court adopted the draft order and proposed findings. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Each of the three paragraphs in this rule declares that entry of judgment occurs when the clerk makes some notation in the minutes. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

In cases where entry of judgment cannot be determined from the express language of this rule, fair notice concerns indicate that "entry" occurs only after draft orders or judgments are submitted to and adopted by the court. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Entry of Judgment in a Divorce Action. — Because the pronouncement of divorce judgment was not entered within the explicit meaning of this Rule, and judgment can be entered only after the requisite findings of fact have been adopted in a divorce action under § 50-10, entry of judgment of absolute divorce did not occur until counsel submitted the judgment to the court and the court signed the judgment. Bumgardner v. Bumgardner, 113 N.C. App. 314, 438 S.E.2d 471 (1994).

Quoted in Capital Outdoor Adv., Inc. v. City of Raleigh, 337 N.C. 150, 446 S.E.2d 289, rehearing denied, 337 N.C. 807, 449 S.E.2d 566 (1994).

Stated in Bunting v. Bunting, 100 N.C. App. 294, 395 S.E.2d 713 (1990); Saieed v. Bradshaw, 110 N.C. App. 855, 431 S.E.2d 233 (1993).

Cited in Custom Molders, Inc. v. Roper Corp., 101 N.C. App. 606, 401 S.E.2d 96 (1991); Smith v. Gupton, 110 N.C. App. 482, 429 S.E.2d 737 (1993); Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994).

Rule 59. New trials; amendment of judgments.

CASE NOTES

I. In General.
II. Time for Serving Motions and Affidavits.
III. Altering or Amending Judgments.

I. IN GENERAL.

Refusal to Award New Trial Upheld. —

Where there was nothing in the record to indicate that jury award was influenced by passion or prejudice, it was not a manifest abuse of discretion for the trial judge to uphold the jury's verdict and to deny plaintiff's motion for a new trial. McFarland v. Cromer, 117 N.C. App. 678, 453 S.E.2d 527 (1995).

Discretion of Court as to Motion, etc. —

A motion for a new trial on the grounds of grossly inadequate or excessive damages under this rule is within the sound discretion of the trial court and may be reversed on appeal only when an abuse of discretion is clearly established. Wilkinson v. Cruz, 100 N.C. App. 420, 396 S.E.2d 811 (1990).

Evaluation of Jury Award. — Because a motion for a new trial must be considered on the basis of the jury award, it is error to base an evaluation of the motion on an amount different from that award. Allen v. Beddingfield, 118 N.C. App. 100, 454 S.E.2d 287 (1995).

In deciding a party's motion for a new trial under this Rule, the trial court is limited to a determination of whether the jury's award of damages is inadequate or the jury's verdict is otherwise in error. Allen v. Beddingfield, 118 N.C. App. 100, 454 S.E.2d 287 (1995).

Trial judge has discretionary power to set aside an award, etc. —

In accord with the main volume. See Maintenance Equip. Co. v. Godley Bldrs., 107 N.C. App. 343, 420 S.E.2d 199 (1992).

Remand for New Trial on Damage Issues. — Where the trial judge remarked that the maximum amount of damages that could have been available under the evidence presented was $45,000, but he only remitted the award to $60,000, which was still excessive under the evidence presented and constituted a manifest abuse of discretion, a remand for a new trial on the issue of damages was required. Munie v. Tangle Oaks Corp., 109 N.C. App. 336, 427 S.E.2d 149 (1993).

Where the evidence showed that defendants were not misled by plaintiff about its possession of a certificate of authority to transact business in North Carolina, defendants' failure to raise the issue of plaintiff's authority to transact business in North Carolina in a motion prior to trial, as required by § 55-15-02(a), precluded it from doing so in a motion after trial. Spivey & Self, Inc. v. Highview Farms, Inc., 110 N.C. App. 719, 431 S.E.2d 535, cert. denied, 334 N.C. 623, 435 S.E.2d 342 (1993).

Timing of Judgment on Motion. — This rule requires that a motion for a new trial or to amend a judgment be made within ten days of the judgment, but does not prescribe the time for judicial action on the motion; therefore, when defendant moved to amend the judgment within the ten-day window provided by subsection (e), the trial court had authority to enter its supplemental judgment on that motion nearly a month later. Buford v. GMC, 339 N.C. 396, 451 S.E.2d 293 (1994).

Punitive Damages Held Not Excessive. — Where plaintiff clearly presented sufficient evidence to prove he was entitled to an award of punitive damages, upon a strict review of the record it could not be said as a matter of law that the trial court erred in denying defendant's motion for a new trial on the grounds of excessive punitive damages. State v. Morrell, 108 N.C. App. 465, 424 S.E.2d 147, appeal dismissed, 333 N.C. 463, 427 S.E.2d 626 (1993).

No Abuse of Discretion Found. — No abuse of discretion was found where a jury awarded $225,000.00 against an insurance company for bad faith refusal to settle. Lovell v. Nationwide Mut. Ins. Co., 108 N.C. App. 416, 424 S.E.2d 181, aff'd in part; discretionary review improvidently granted in part, 334 N.C. 682, 435 S.E.2d 71 (1993).

Notice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for review. Von Ramm v. Von Ramm, 99 N.C. App. 153, 392 S.E.2d 422 (1990).

Applied in Burgess v. Vestal, 99 N.C. App. 545, 393 S.E.2d 324 (1990); Pate v. Eastern Insulation Serv. of New Bern, Inc., 101 N.C. App. 415, 399 S.E.2d 338 (1991); Mickens v. Robinson, 103 N.C. App. 52, 404 S.E.2d 359 (1991); Beaver v. Hampton, 106 N.C. App. 172, 416 S.E.2d 8 (1992); Scott v. Scott, 106 N.C. App. 379, 416 S.E.2d 583 (1992); Perry-Griffin Found. v. Proctor, 107 N.C. App. 528, 421 S.E.2d 186 (1992); Jones ex rel. Jones v. Hughes, 110 N.C. App. 262, 429 S.E.2d 399 (1993); Heart of Valley Motel, Inc. v. Edwards, 111 N.C. App. 896, 433 S.E.2d 466 (1993); Guilford County Planning & Dev. Dep't v. Simmons, 115 N.C. App. 87, 443 S.E.2d 765 (1994).

Cited in Schall v. Jennings, 99 N.C. App. 343, 393 S.E.2d 130 (1990); First Am. Bank v. Carley Capital Group, 99 N.C. App. 667, 394 S.E.2d 237 (1990); Daum ex rel. Henderson v. Lorick Enters., Inc., 105 N.C. App. 428, 413 S.E.2d 559 (1992); McClain v. Otis Elevator Co., 106 N.C App. 45, 415 S.E.2d 78 (1992); Mabry v. Nationwide Mut. Fire Ins. Co., 108 N.C. App. 37, 422 S.E.2d 322 (1992); Plummer v. Kearney, 108 N.C. App. 310, 423 S.E.2d 526 (1992); Harrison v. Edison Bros. Apparel Stores, 814 F. Supp. 457 (M.D.N.C. 1993); Nations v. Nations, 111 N.C. App. 211, 431 S.E.2d 852 (1993); Giles ex rel. Giles v. Smith, 112 N.C. App. 508, 435 S.E.2d 832 (1993); Tate v. Christy, 114 N.C. App. 45, 440 S.E.2d 858 (1994); Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994); Baker v. Baker, 115 N.C. App. 337, 444 S.E.2d 478 (1994); Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994); Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994); Green v. Rouse, 116 N.C. App. 647, 448 S.E.2d 846 (1994); Wachovia Bank v. Bob Dunn Jaguar, Inc., 117 N.C. App. 165, 450 S.E.2d 527 (1994); Chee v. Estes, 117 N.C. App. 450, 451 S.E.2d 349 (1994); Outen v. Mical, 118 N.C. App. 263, 454 S.E.2d 883 (1995); Shamley v. Shamley, 117 N.C. App. 175, 455 S.E.2d 435 (1994).

II. TIME FOR SERVING MOTIONS AND AFFIDAVITS.

Service vs. Filing. — This rule requires that the motion be served, not filed, within ten days after entry of judgment. Muse v. Charter Hosp., 117 N.C. App. 468, 452 S.E.2d 589, petition denied as to additional issued, 340 N.C. 114, 455 S.E.2d 663 (1995).

Defendant's Motion Held Untimely. — Where, by the express terms of the parties' divorce agreement, defendant had at least constructive knowledge that one of plaintiff's possible alternatives to recover support payments included foreclosure on defendant's property mentioned in the agreement, there was no merit in defendant's contention that this constituted newly discovered evidence which by due diligence he could not have discovered in time to move for a new trial under section (b) of this Rule. Lang v. Lang, 108 N.C. App. 440, 424 S.E.2d 190 (1993).

III. ALTERING OR AMENDING JUDGMENTS.

Amendment upon Motion of the Court. — A trial court has the power to amend its judgment on its own motion within the ten-day period provided by section (e) of this rule. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

This rule is an inappropriate vehicle to challenge the denial of a Rule 60 motion. Garrison ex rel. Chavis v. Barnes, 117 N.C. App. 206, 450 S.E.2d 554 (1994).

Rule 60. Relief from judgment or order.

CASE NOTES

I. In General.
II. Relief under Subsection (a).
III. Relief under Subsection (b).
  A. In General.
  B. Mistake, Inadvertence, Surprise and Excusable Neglect.
    1. In General.
    2. Relief Held Proper.
    3. Relief Held Improper.
  E. Other Reasons Justifying Relief under Subdivision (b)(6).
  F. Void Judgments.

I. IN GENERAL.

Claim That Judgment Is Defective Not Permitted After Accepting Its Benefits. — After petitioning the court to enter a default judgment, plaintiff relied upon its validity and force thrice — by executing on it; by retaining the money collected by execution; and by suing defendant in a separate action for future rents. The law does not permit a party to claim that a judgment is defective after relying upon its validity and accepting its benefits. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Applied in Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990); Carter v. Carter, 102 N.C. App. 440, 402 S.E.2d 469 (1991); Jackson v. Jackson, 102 N.C. App. 574, 402 S.E.2d 869 (1991); State ex rel. Blossom v. Murray, 103 N.C. App. 653, 406 S.E.2d 302 (1991); Faucette v. Dickerson, 103 N.C. App. 620, 406 S.E.2d 602 (1991); Hoolapa v. Hoolapa, 105 N.C. App. 230, 412 S.E.2d 112 (1992); Loftis v. Reynolds, 105 N.C. App. 697, 414 S.E.2d 378 (1992); John Henry Spainhour & Sons Grading Co. v. Carolina E.E. Homes, Inc., 109 N.C. App. 174, 426 S.E.2d 728 (1993); Holloway v. Wachovia Bank & Trust Co., 109 N.C. App. 403, 428 S.E.2d 453 (1993); Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993); Bumgardner v. Bumgardner, 113 N.C. App. 314, 438 S.E.2d 471 (1994); Jenkins v. Middleton, 114 N.C. App. 799, 443 S.E.2d 110 (1994); Pittman v. Barker, 117 N.C. App. 580, 452 S.E.2d 326, cert. denied, 340 N.C. 261, 456 S.E.2d 833 (1995).

Quoted in Waldrop v. Young, 104 N.C. App. 294, 408 S.E.2d 883 (1991); In re Estate of Peebles, 118 N.C. App. 296, 454 S.E.2d 854 (1995).

Stated in Vanburen County Dep't of Social Servs. ex rel. Swearengin v. Swearengin, 118 N.C. App. 324, 455 S.E.2d 161 (1995).

Cited in Von Ramm v. Von Ramm, 99 N.C. App. 153, 392 S.E.2d 422 (1990); Yates Constr. Co. v. Greenleaf Corp., 99 N.C. App. 489, 393 S.E.2d 563 (1990); Hill v. Hanes Corp., 102 N.C. App. 46, 401 S.E.2d 768 (1991); Metts v. Piver, 102 N.C. App. 98, 401 S.E.2d 407 (1991); Patrick v. Ronald Williams, Professional Ass'n, 102 N.C. App. 355, 402 S.E.2d 452 (1991); In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991); Scott v. Scott, 106 N.C. App. 379, 416 S.E.2d 583 (1992); Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992); In re Hayes, 106 N.C. App. 652, 418 S.E.2d 304 (1992); Perry-Griffin Found. v. Proctor, 107 N.C. App. 528, 421 S.E.2d 186 (1992); Smith v. Gupton, 110 N.C. App. 482, 429 S.E.2d 737 (1993); Smith v. Smith, 334 N.C. 81, 431 S.E.2d 196 (1993); Berkeley Fed. Sav. & Loan Ass'n v. Terra Del Sol, Inc., 111 N.C. App. 692, 433 S.E.2d 449 (1993); Bynum v. Frederickson Motor Express Corp., 112 N.C. App. 125, 434 S.E.2d 241 (1993); Hooper v. Pizzagalli Constr. Co., 112 N.C. App. 400, 436 S.E.2d 145 (1993); Bell Atl. Tricon Leasing Corp. v. Johnnie's Garbage Serv., Inc., 113 N.C. App. 476, 439 S.E.2d 221 (1994); Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994); Davis v. Sellers, 115 N.C. App. 1, 443 S.E.2d 879 (1994), cert. denied, 339 N.C. 610, 454 S.E.2d 248 (1995); Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994); Bullard v. Bader, 117 N.C. App. 299, 450 S.E.2d 757 (1994); Muse v. Charter Hosp., 117 N.C. App. 468, 452 S.E.2d 589, petition denied as to additional issued, 340 N.C. 114, 455 S.E.2d 663 (1995); Benton v. Thomerson, 339 N.C. 598, 453 S.E.2d 161 (1995).

II. RELIEF UNDER SUBSECTION (a).

Limit on Court's Power. — Subsection (a) permits the courts to correct clerical errors or omissions; however, courts do not have the power under this section to affect the substantive rights of the parties or to correct substantive errors in their decisions. Watson v. Watson, 118 N.C. App. 534, 455 S.E.2d 866 (1995).

Amended order made substantive changes in the original order and was not an attempt to correct clerical errors; therefore, the amended order was hereby vacated as outside the authority of subsection (a) and the original order remained in full force and effect. Buncombe County ex rel. Child Support Enforcement Agency ex rel. Andres v. Newburn, 111 N.C. App. 822, 433 S.E.2d 782 (1993).

By changing the incorrect date of entry of judgment to a date other than the actual date judgment was entered, the trial court improperly altered the substantive rights of the parties by extending the period in which the parties could file a timely notice of appeal; this rule does not vest the trial court with such authority. Food Serv. Specialists v. Atlas Restaurant Mgt., Inc., 111 N.C. App. 257, 431 S.E.2d 878 (1993).

III. RELIEF UNDER SUBSECTION (b).

A. In General.

The purpose of subsection (b) of this rule is to strike a proper balance between the conflicting principles of finality and relief from unjust judgments. Generally, the rule is liberally construed. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

To proceed under subsection (b) of this rule requires an initial determination of whether a notice of dismissal constitutes a "judgment, order or proceeding." Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Motion Under Subsection (b) of This Rule Cannot Be a Substitute for Appellate Review, etc. —

In accord with paragraph in main pamphlet. See Jenkins v. Richmond County, 118 N.C. App. 166, 454 S.E.2d 290 (1995).

Because defendant attempted to use a subdivision (b)(6) motion as a substitute for appellate review, the trial court's order denying defendant's motion was affirmed. Garrison ex rel. Chavis v. Barnes, 117 N.C. App. 206, 450 S.E.2d 554 (1994).

Amendment of Voluntary Dismissal. — A voluntary dismissal under § 1A-1, Rule 41(a)(1) can be amended pursuant to section (b) of this rule. Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc., 333 N.C. 250, 424 S.E.2d 383 (1993).

When Consent Judgment May Be Changed, etc. —

A consent judgment incorporates the bargained agreement of the parties. Such a judgment can only be attacked on limited grounds. The party attacking the judgment must properly allege and prove that consent was not in fact given, or that it was obtained by mutual mistake or fraud. Stevenson v. Stevenson, 100 N.C. App. 750, 398 S.E.2d 334 (1990).

A contract may be avoided based on mutual mistake where the mistake is common to both parties and because of it each has done what neither intended. A unilateral mistake, unaccompanied by fraud, imposition, or like circumstances, is not sufficient to avoid a contract. These contract principles apply to consent judgments. Stevenson v. Stevenson, 100 N.C. App. 750, 398 S.E.2d 334 (1990).

Absent a showing of fraud, mutual mistake or a lack of consent, attacks on consent judgments are controlled by Rule 60(b)(6). Thacker v. Thacker, 107 N.C. App. 479, 420 S.E.2d 479, cert. denied, 332 N.C. 672, 424 S.E.2d 407 (1992).

Plaintiffs' motion was not made within a reasonable time, and they were not entitled to relief where plaintiffs waited literally an entire year before filing their motion for relief, and this motion followed not only the dismissal of their appeal from the judgment itself, but also the dismissal of their appeal from the order dismissing their appeal from the judgment. Jenkins v. Richmond County, 118 N.C. App. 166, 454 S.E.2d 290 (1995).

Delay Held Unreasonable. — Trial court did not abuse its discretion in concluding that delay of one year in filing motion for relief under section (b) of this rule was unreasonable and in denying the motion. Brown v. Windhom, 104 N.C. App. 219, 408 S.E.2d 536 (1991).

Appellate review of a motion under section (b), etc. —

In accord with first paragraph in the main volume. See Gallbronner v. Mason, 101 N.C. App. 362, 399 S.E.2d 139, appeal dismissed, 333 N.C. 167, 399 S.E.2d 139 (1992).

In accord with second paragraph in the main volume. See In re Finnican, 104 N.C. App. 157, 408 S.E.2d 742 (1991).

Court Not Required to Make Findings of Fact. — Where the trial court denied the motion to set aside the default judgment without making findings of fact, a better practice would have been to make findings of fact when ruling on a motion under subsection (b); however, the trial court is not required to do so. McLean v. Mechanic, 116 N.C. App. 271, 447 S.E.2d 459 (1994), review denied, 339 N.C. 738, 454 S.E.2d 654, cert. denied, 339 N.C. 738, 454 S.E.2d 653 (1995).

When Court Fails to Make Findings of Fact. — Where the trial court does not make findings of fact in its order denying the motion to set aside the judgment, the question on appeal is whether, on the evidence before it, the court could have made findings of fact sufficient to support its legal conclusion. Grant v. Cox, 106 N.C. App. 122, 415 S.E.2d 378 (1992).

Court's Miscalculation of Ability to Pay Alimony Arrearages Held Error. — Where the trial court understated defendant's monthly expenses by approximately $500.00 per month and failed to include that amount in its calculation of the amount of defendant's present ability to pay alimony arrearages and prospective alimony, while this miscalculation may have had no effect on the trial court's order of specific performance, it may have had an effect on the amount defendant can reasonably afford to pay plaintiff on a monthly basis; the trial court's miscalculation in this situation was of a substantial nature and was a prejudicial error. Edwards v. Edwards, 102 N.C. App. 706, 403 S.E.2d 530, cert. denied, 329 N.C. 787, 408 S.E.2d 518 (1991).

Where defendants contended that a mistake was mutual in that both parties settling a wrongful death claim agreed to purchase an annuity for $300,000.00 and that both parties were mistaken as to the actual future payments that the decedent's child would receive from the annuity based on a present value of $300,000.00, as based on incorrect figures received from the annuity company, but where the settlement agreement made no representation as to the cost of the annuity to defendants, and the agreement did not set forth a present value for the settlement, but rather simply set forth the payments to be made by the defendants to decedent's wife and child, the defendants' allegation that the mistake as to the present value of the annuity was mutual was not evident in the settlement agreement. Goodwin v. Cashwell, 102 N.C. App. 275, 401 S.E.2d 840 (1991).

Jurisdiction. — Equitable distribution action and ancillary claim for restitution held properly dismissed for lack of personal jurisdiction over defendant where evidence failed to show that defendant purposefully established numerous contacts with this state. Shamley v. Shamley, 117 N.C. App. 175, 455 S.E.2d 435 (1994).

B. Mistake, Inadvertence, Surprise and Excusable Neglect.

1. In General.

Final Adjudication. — Once the one-year period for refiling an action has elapsed and the action can no longer be resurrected, the voluntary dismissal acts as a final adjudication for purposes of section (b). Robinson v. General Mills Restaurants, Inc., 110 N.C. App. 633, 430 S.E.2d 696, cert. granted, 334 N.C. 623, 435 S.E.2d 340, 341 (1993).

Relief Possible Without Motion. — [A]lthough this rule says that the court is to act "on motion," it does not deprive the court of the power to act in the interest of justice in an unusual case where its attention has been directed to the necessity for relief by means other than a motion. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Findings of Fact. — Under section (b), the trial court is not required to make findings of fact unless requested to do so by a party. Nations v. Nations, 111 N.C. App. 211, 431 S.E.2d 852 (1993).

Along with Finding of a Meritorious Defense. —

A party moving to set aside a judgment under subdivision (b)(1) must show not only mistake, inadvertence, surprise or excusable neglect, but also the existence of a meritorious defense. Baker v. Baker, 115 N.C. App. 337, 444 S.E.2d 478 (1994).

Waiver of Errors. — Errors of law alleged to have been committed by the trial court in entering the equitable distribution judgment were issues which could have been raised in the first appeal to the Court of Appeals; therefore, the trial court did not abuse its discretion in denying section (b) motion, as the record could support no other conclusion. Nations v. Nations, 111 N.C. App. 211, 431 S.E.2d 852 (1993).

2. Relief Held Proper.

Failure to Maintain Agent for Service of Process. — Where defendant corporation failed for more than eight years to maintain a registered agent in North Carolina to receive service of process, and failed, for over eight years, to notify the Secretary of State that its address had changed, there existed competent evidence in the record of inexcusable neglect that led to the entry a default judgment which could not be set aside. Patridge v. Associated Cleaning Consultants & Servs., Inc., 108 N.C. App. 625, 424 S.E.2d 664 (1993).

3. Relief Held Improper.

Consent Order. — Motion under section (b)(6) of this rule should have been denied where defendant altered the agreement from what was agreed upon at trial, as each side apparently did during several redrafts. There was no finding or evidence which would lead to a conclusion that this was inadvertent; therefore, any mistake was not mutual, and a consent order incorporating the agreement could not be modified. Stevenson v. Stevenson, 100 N.C. App. 750, 398 S.E.2d 334 (1990).

A finding that plaintiff received a greater percentage of the marital assets pursuant to the consent judgment would not otherwise be sufficient to render the agreement invalid, and defendant could not invoke the broad language of subdivision (b)(6) of this rule simply to obtain relief to which she was otherwise not entitled. Thacker v. Thacker, 107 N.C. App. 479, 420 S.E.2d 479, cert. denied, 332 N.C. 672, 424 S.E.2d 407 (1992).

Subdivision (b)(6) of this rule is not a catch-all rule; in order to be entitled to relief thereunder, the movant must show that (1) extraordinary circumstances exist and that (2) justice demands such relief. Goodwin v. Cashwell, 102 N.C. App. 275, 401 S.E.2d 840 (1991).

Failure to Attend Proceedings After Insurance Carrier Refused to Defend. — Where defendants were well aware that their insurance carrier refused to represent them, and counsel for plaintiff waited three months before moving for default and also sent defendants a letter stating his intention to seek default if defendants continued to fail to respond, there was sufficient time to protect their interests; accordingly, trial court's refusal to grant defendants relief from judgment for excusable neglect was not an abuse of discretion. Hayes v. Evergo Tel. Co. Ltd., 100 N.C. App. 474, 397 S.E.2d 325 (1990).

An order reopening and enlarging a default judgment was erroneous because, by deciding to obtain a final judgment for the sum certain that was owed when the default judgment was entered, rather than to have the damages determined later by a trial, plaintiff waived any right it might have had to obtain judgment for a larger amount. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Plaintiff's affidavits did not support the court's finding that judgment was entered as a result of mistake, inadvertence or excusable neglect, as the inadvertence, mistake, or neglect that they showed were of a kind that the law does not excuse. All the affidavits showed, when sifted down, was that in signing the court papers which enabled default judgment to be entered plaintiff's treasurer and counsel were unaware that they had sued for future rents — a matter that they could have known through the exercise of due diligence and reasonable care, and that they were required to know by § 1A-1, Rule 11 of our civil procedure rules. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

E. Other Reasons Justifying Relief under Subdivision (b)(6).

Subdivision (b)(6) of this section is equitable in nature and authorizes the trial judge to exercise his discretion in granting or withholding the relief sought. State ex rel. Envtl. Mgt. Comm'n v. House of Raeford Farms, Inc., 101 N.C. App. 433, 400 S.E.2d 107, discretionary review denied, 328 N.C. 576, 403 S.E.2d 521 (1991).

Subdivision (b)(6) serves as a "grand reservoir of equitable power" by which a court may grant relief from a judgment whenever extraordinary circumstances exist and there is a showing that justice demands it. Dollar v. Tapp, 103 N.C. App. 162, 404 S.E.2d 482 (1991).

Subdivision (b)(6) has been referred to as a "vast reservoir of equitable power." Lumsden v. Lawing, 117 N.C. App. 514, 451 S.E.2d 659 (1995).

Subdivision (b)(6) Not a "Catch-All" Rule. —

Although subsection (b)(6) of this rule has often been termed "a vast reservoir of equitable power," a court cannot set aside a judgment pursuant to this rule without a showing (1) that extraordinary circumstances exist, and (2) that justice demands relief. Thacker v. Thacker, 107 N.C. App. 479, 420 S.E.2d 479, cert. denied, 332 N.C. 672, 424 S.E.2d 407 (1992).

Two-Pronged Test. — The setting aside of a judgment pursuant to subsection (b)(6) of this rule should only take place where (i) extraordinary circumstances exist and (ii) there is a showing that justice demands it. This test is two-pronged, and relief should be forthcoming only where both requisites exist. In addition to these requirements, the movant must also show that he has a meritorious defense. State ex rel. Envtl. Mgt. Comm'n v. House of Raeford Farms, Inc., 101 N.C. App. 433, 400 S.E.2d 107, discretionary review denied, 328 N.C. 576, 403 S.E.2d 521 (1991).

Failure to Obtain Personal Jurisdiction Over Defendant. — Motion to set aside the consent judgment, although made more than six years after its entry, was based on the argument that the trial court did not have personal jurisdiction over defendant. Because a judgment entered without personal jurisdiction over a party is void, defendant's motion was not untimely because it was undisputed that defendant neither accepted service of process nor was served with process. Nye, Mitchell, Javis & Bugg v. Oates, 109 N.C. App. 289, 426 S.E.2d 291 (1993).

Where the record supported the trial court's finding that there was no evidence to show that plaintiff's attorney had actual knowledge of an address where defendant could be served, substituted service on the Secretary of State was effective, and trial court did not err in denying defendant's motion to set aside the judgment on that ground pursuant to subdivision (b)(4) of this rule. Patridge v. Associated Cleaning Consultants & Servs., Inc., 108 N.C. App. 625, 424 S.E.2d 664 (1993).

The lack of notice to interested party of the original incompetency proceeding would clearly justify granting relief pursuant to subsection (b)(6). In re Ward, 337 N.C. 443, 446 S.E.2d 40 (1994).

Motion to Amend Consent Judgment Not Allowed. — Subsection (b)(6) of this rule permits motions for relief from judgments for "[a]ny other reason justifying relief from the operation of the judgment." However, where a request for relief pursuant to subsection (b)(6) of this rule was in reality a motion to amend the Consent Judgment and that result could not be achieved by a motion under subsection (b)(6). State ex rel. Envtl. Mgt. Comm'n v. House of Raeford Farms, Inc., 101 N.C. App. 433, 400 S.E.2d 107, discretionary review denied, 328 N.C. 576, 403 S.E.2d 521 (1991).

Failure to Perfect Appeal. — The Superior Court's appropriate dismissal of defendant's appeal on the grounds that defendant failed to perfect it barred any discussion of the merits of the exchange rate used in the judgment; accordingly, the trial court properly denied defendant's motion under subdivision (b)(6) of this rule. Lang v. Lang, 108 N.C. App. 440, 424 S.E.2d 190 (1993).

Where Department of Transportation (DOT) made no showing of extraordinary circumstances or that justice required relief from the execution and order in aid of execution, the trial court erred by granting DOT such relief. Able Outdoor, Inc. v. Harrelson, 113 N.C. App. 483, 439 S.E.2d 245, cert. granted, 336 N.C. 314, 445 S.E.2d 391 (1994).

After foreclosure, where property was owned and possessed by independent third persons, it was impossible for plaintiffs to satisfy the requirement of reconveyance; this change in circumstances is a good example of a situation which would justify relief under subdivision (b)(6). Lumsden v. Lawing, 117 N.C. App. 514, 451 S.E.2d 659 (1995).

F. Void Judgments.

A judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered. Burton v. Blanton, 107 N.C. App. 615, 421 S.E.2d 381 (1992).

A judgment is not void, etc. —

A judgment, if proper on its face, is not void. Burton v. Blanton, 107 N.C. App. 615, 421 S.E.2d 381 (1992).

Time for Attacking Void Judgment, etc. —

In accord with the main volume. See In re Finnican, 104 N.C. App. 157, 408 S.E.2d 742 (1991).

Lack of In Personam Jurisdiction. — Judgment entered against defendant over which the court does not have in personam jurisdiction is void and subject to being set aside pursuant to subsection (b)(4) of this rule. Hayes v. Evergo Tel. Co., 100 N.C. App. 474, 397 S.E.2d 325 (1990).

Motion Under Subsection (b)(4) Held Inappropriate. — Where the court had jurisdiction and authority to enter a contempt order, the order was not void, and therefore, a subsection (b)(4) motion was an inappropriate means to rectify the alleged error of failing to appoint counsel for defendant. Vaughn v. Vaughn, 99 N.C. App. 574, 393 S.E.2d 567 (1990).

Rule 61. Harmless error.

CASE NOTES

Introduction of Erroneous Instruction. — Trial court did not commit prejudicial error by presenting an allegedly erroneous view of the law regarding breach of fiduciary duty in its instruction to the jury by basing the instruction on a North Carolina case rather than on several Georgia cases cited in plaintiffs' brief because there was no substantial difference between the Georgia and North Carolina cases regarding the treatment of minority stockholders in a close corporation. Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993), cert. denied, 334 N.C. 621, 435 S.E.2d 338 (1993).

The exclusion of memorandum as evidence was harmless error because plaintiff did not show that (1) it was prejudiced by the exclusion of the memorandum and (2) had the memorandum been admitted, a different result would likely have ensued. Raintree Homeowners Ass'n v. Bleimann, 116 N.C. App. 561, 449 S.E.2d 13, cert. granted, 338 N.C. 669, 453 S.E.2d 180 (1994).

Applied in Sheppard v. Zep Mfg. Co., 114 N.C. App. 25, 441 S.E.2d 161 (1994); In re Ezzell, 113 N.C. App. 388, 438 S.E.2d 482 (1994); In re Chasse, 116 N.C. App. 52, 446 S.E.2d 855 (1994).

Cited in Madden v. Carolina Door Controls, Inc., 117 N.C. App. 56, 449 S.E.2d 769 (1994).

Rule 63. Disability of a judge.

CASE NOTES

Original Judge Need Not Have Become Incapacitated. — Trial court did not err in having their post-judgment motions ruled upon by another judge; this rule neither requires nor implies that before a different judge can rule on post-trial motions, the judge who heard the case must have become incapacitated. Borg-Warner Acceptance Corp. v. Johnston, 107 N.C. App. 174, 419 S.E.2d 195 (1992), cert. denied, 333 N.C. 254, 424 S.E.2d 918 (1993).

ARTICLE 8.

Miscellaneous.

Rule 65. Injunctions.

CASE NOTES

I. In General.
II. Preliminary Injunctions.

I. IN GENERAL.

Applied in Industrial Innovators, Inc. v. Myrick-White, Inc., 99 N.C. App. 42, 392 S.E.2d 425 (1990).

Quoted in Barr-Mullin, Inc. v. Browning, 108 N.C. App. 590, 424 S.E.2d 226 (1993).

Stated in Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993).

II. PRELIMINARY INJUNCTIONS.

Verification of Complaint Not a Condition for Issuance. — Verification of a complaint is not a condition for issuance of a preliminary injunction under this rule. Moore v. Wykle, 107 N.C. App. 120, 419 S.E.2d 164, cert. denied, 332 N.C. 666, 424 S.E.2d 405 (1992).

Rule 68. Offer of judgment and disclaimer.

CASE NOTES

I. In General.

I. IN GENERAL.

Prevailing Parties. — Because the rational behind this rule is to encourage a voluntary, mutual settlement, both parties may consider themselves prevailing parties. Evans v. Full Circle Prods., Inc., 114 N.C. App. 777, 443 S.E.2d 108 (1994).

Ambiguity of Phrase. — The phrase "together with costs accrued" was ambiguous as to whether the "costs accrued" were included in the amount offered pursuant to this rule or whether the costs were left to be separately determined by the court. Craighead v. Carrols Corp., 115 N.C. App. 381, 444 S.E.2d 651 (1994).

Where the jury verdict was less than defendant's offer of judgment, under this rule, attorney's fees, expert fees, and interest incurred after the offer should have been borne by plaintiff. Poole v. Miller, 116 N.C. App. 435, 448 S.E.2d 123, cert. granted, 338 N.C. 668, 453 S.E.2d 179 (1994).

Interest and Other Costs Not Included. — Where the relevant portion of defendant's offer of judgment allowed judgment to be taken against them for "$10,001.00 for all damages and attorney's fees taxable as costs, together with the remaining costs accrued"; use of the language "together with" evidenced an intent to make an offer of judgment only as to the substantive claim and attorney fees, but not as to any other costs such as interest; therefore, construing the offer against defendants, as the drafters, a lump sum offer was not intended. Aikens v. Ludlum, 113 N.C. App. 823, 440 S.E.2d 319 (1994).

Taxing of Costs on Nonspecific Offer. — Trial court did not have authority under this rule to tax costs to the plaintiff where defendants made a nonspecific offer for both plaintiffs to take judgment against defendants for a total sum of $25,000. When multiple plaintiffs in the same complaint have independent claims for relief, an offer of judgment can be valid only if it is specific as to the offer made to each plaintiff; a party wishing to accept the offer should not be barred from doing so, and thus subject himself to penalties under this rule, just because the other party would not accept. True v. T & W Textile Mach., Inc., 112 N.C. App. 358, 435 S.E.2d 551 (1993), cert. granted, 335 N.C. 555, 441 S.E.2d 134, aff'd per curiam, 337 N.C. 798, 448 S.E.2d 514 (1994).

Cited in Burgess v. Vestal, 99 N.C. App. 545, 393 S.E.2d 324 (1990); Patrick v. Ronald Williams, Professional Ass'n, 102 N.C. App. 355, 402 S.E.2d 452 (1991).

Rule 68.1. Confession of judgment.

CASE NOTES

I. In General.

I. IN GENERAL.

Imposition of restitution as a condition of probation is not a legal obligation equivalent to a civil judgment; therefore, in sentences imposed for § 14-100 convictions, that part of the judgment purporting to require defendant to sign confessions of judgment was vacated. State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

Cited in Snipes v. Snipes, 118 N.C. App. 189, 454 S.E.2d 864 (1995).

Chapter 1B.

Contribution.

ARTICLE 1.

Uniform Contribution among Tort-Feasors Act.

§ 1B-1. Right to contribution.

Legal Periodicals. —

For note discussing North Carolina's retention of its partial parent-child immunity doctrine, in light of Lee v. Mowett Sales Co., 316 N.C. 489, 342 S.E.2d 882 (1986), and arguing for its abrogation, see 65 N.C.L. Rev. 1457 (1987).

For note, "The Release Provision of the Uniform Contribution Among Tort-Feasors Act Applies to Vicarious Liability in the Master-Servant Context — Yates v. New South Pizza, Ltd.," see 15 Campbell L. Rev. 55 (1992).

CASE NOTES

I. In General.

I. IN GENERAL.

Chapter Inapplicable in Contract Actions. — By its terms, this Chapter applies only in tort actions, not contract actions. Duke Univ. v. St. Paul Mercury Ins. Co., 95 N.C. App. 663, 384 S.E.2d 36 (1989).

The right to contribution is statutory and is applicable only between joint tort-feasors. Roseboro Ford, Inc. v. Bass, 77 N.C. App. 363, 335 S.E.2d 214 (1985).

No Right to Contribution from One Not a Joint Tort-Feasor. —

There is no right to contribution from one who is not a joint tort-feasor. Holland v. Edgerton, 85 N.C. App. 567, 355 S.E.2d 514 (1987).

The right to contribution does not exist unless two or more parties are joint tort-feasors. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

Nor for Claim on Contract. — Under subsection (a) of this section, a defendant is entitled to contribution where he and one or more other persons are jointly or severally liable in tort. By the clear language of the statute, a defendant is not entitled to contribution for a claim against him in contract. Holland v. Edgerton, 85 N.C. App. 567, 355 S.E.2d 514 (1987).

Claim for relief, based on a breach of implied warranty, gave rise to no right of contribution on the part of third party plaintiff, because it sounded in contract and not in tort. Holland v. Edgerton, 85 N.C. App. 567, 355 S.E.2d 514 (1987).

Contribution Not Available for Intentional Infliction of Mental Distress. — The language of subsection (c) of this section clearly excludes the possibility of contribution on any claim by plaintiffs for intentional infliction of mental distress. Holland v. Edgerton, 85 N.C. App. 567, 355 S.E.2d 514 (1987).

Who Are Joint Tort-Feasors. — Two or more parties are joint tort-feasors when their negligent or wrongful acts are united in time or circumstance such that the two acts constitute one transaction or when two separate acts concur in point of time and place to cause a single injury. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

If independent wrongful acts of two or more persons unite in producing a single indivisible injury, the parties are joint tort-feasors within the meaning of the law. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

Suit Against One or More Joint Tort-Feasors by Personal Representative. — The personal representative of a person killed by the negligence of two joint tort-feasors may, at his election, sue one or both of the tort-feasors. If he sues both and the jury finds them to be joint tort-feasors, the resulting judgment is joint and several and the party paying more than his pro rata share of the judgment is entitled to contribution from the other. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

Joinder of Other Tort-Feasors by Defendant. — Where plaintiff elects to sue only one of several joint tort-feasors, the original defendant may have others joined as additional or third party defendants. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

Separate Action by Defendant Against Other Tort-Feasor. — Where one of two joint tort-feasors is not made a party to the original action, either by the plaintiff or the original defendant, the original defendant may nevertheless, by separate action, seek contribution from the other tort-feasor. In such a case he must establish, not only that a judgment has been entered against him, but that the other party is in fact a joint tort-feasor, that is, that the other party is liable jointly with the original defendant to the plaintiff for damages. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

The burden is on the tort-feasor seeking contribution to show that the right exists, and to allege facts which show liability to the injured party as well as a right to contribution. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

Collateral Estoppel Not Available to Show Joint and Several Liability of One Not Made Defendant in Action. — Where, after wrongful death action in which mother was neither named as a defendant nor named as a third party defendant, and in which insured was found to have caused the death of child in a car accident, insurer sought contribution from mother for half of the money paid to the child's estate, the doctrine of collateral estoppel was not available to the insurer to show mother's joint and several liability to the estate of the child; since mother was not a party to the wrongful death claim and was not made a third party defendant for the purpose of contribution, neither her liability to the estate of child nor her liability to insurer as a joint tort-feasor was established by the judgment in the original action. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

To permit an original defendant against whom a judgment is entered in a claim for the wrongful death of a child to collect one-half of the judgment from the parent, based solely on determination of parent's negligence for the purpose of assessing damages against defendant, would effectively remove any need to make the parent a third party defendant. The practical effect of such a holding would be to prevent the parent's insurer from having an opportunity to defend a claim against the parent. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

Third-party plaintiff had an affirmative burden to show that he met the requirements of subsection (d) of this section, and he failed to meet this burden where he did not introduce evidence of a release that he claimed he obtained from the injured party, nor show that third-party defendant's liability to the injured party had been extinguished. King v. Humphrey, 88 N.C. App. 143, 362 S.E.2d 614 (1987).

Trial court erred in not applying § 1B-4 where, in their complaint, plaintiffs treated defendants as joint tort-feasors and sought relief from flood damage caused by mud and silt runoff from all defendants' properties, and evidence at trial revealed only a single indivisible injury, the flooding of plaintiffs' property, and until appeal plaintiffs did not attempt to allocate their injury among defendants. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

For defendant to be entitled to verdict reduction in the amount of a pretrial settlement between plaintiffs and two other defendants, it must not only appear that the three defendants are tort-feasors, but also that the negligence of all three defendants caused an indivisible injury. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

Church was not entitled to contribution from the YMCA where the church paid nothing of its own in settlement; therefore, it did not pay more than its pro rata share and was not entitled to contribution. Jones v. Shoji, 336 N.C. 581, 444 S.E.2d 203 (1994).

Although it appears that the legislature intended the phrase in subsection (f) of this section to mean "where one tort-feasor is entitled to indemnity from another tort-feasor," the language of the statute is simply "where one tort-feasor is entitled to indemnity from another." Since the term "another" as used in the statute is ambiguous, by applying principles of statutory construction to ascertain the legislative will, and the title of the Act makes clear that the statute applies to "tort-feasors"; the context of the legislation indicates that it is concerned only with the apportionment of loss as between tort-feasors, and the Act should not be read to speak to apportionment of loss by contract between a tort-feasor and a third party. Yates v. New S. Pizza, Ltd., 102 N.C. App. 66, 401 S.E.2d 380 (1991), rev'd on other grounds, 330 N.C. 790, 412 S.E.2d 666, reh'g denied, 331 N.C. 292, 417 S.E.2d 73 (1992).

Applied in United States v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985); Yates v. New S. Pizza, Ltd., 330 N.C. 790, 412 S.E.2d 666 (1992).

Quoted in Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 363 S.E.2d 643 (1988).

Cited in Selective Ins. Co. v. NCNB Nat'l Bank, 324 N.C. 560, 380 S.E.2d 521 (1989); Sorrells v. M.Y.B. Hospitality Ventures, 108 N.C. App. 668, 424 S.E.2d 676 (1993).

§ 1B-3. Enforcement.

CASE NOTES

Subsection (e) codifies the common-law rule applicable to joint tort-feasors. Ipock v. Gilmore, 73 N.C. App. 182, 326 S.E.2d 271, cert. denied, 314 N.C. 116, 332 S.E.2d 481 (1985), aff'd, 85 N.C. App. 70, 354 S.E.2d 315 (1987).

Party Entitled to One Satisfaction. — Although an injured party may pursue and obtain judgments against all joint tort-feasors for a single injury, he may have only one satisfaction. Ipock v. Gilmore, 73 N.C. App. 182, 326 S.E.2d 271, cert. denied, 314 N.C. 116, 332 S.E.2d 481 (1985), aff'd, 85 N.C. App. 70, 354 S.E.2d 315 (1987).

Statute of Limitations. — Subdivision (d)(3) must be read to provide for a three-year statute of limitations for refiling contribution claims. Safety Mut. Cas. Corp. v. Spears, 104 N.C. App. 467, 409 S.E.2d 736 (1991), cert. granted, 331 N.C. 118, 415 S.E.2d 200 (1992), petition withdrawn, 333 N.C. 346, 429 S.E.2d 552 (1993).

The legislature has failed to fix a time in subdivision (d)(3) for refiling contribution claims in the situation where a party brings a claim for contribution that is voluntarily dismissed after settlement of the underlying claim. However, the legislature has provided that a three-year statute of limitations applies upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it. Safety Mut. Cas. Corp. v. Spears, 104 N.C. App. 467, 409 S.E.2d 736 (1991), cert. granted, 331 N.C. 118, 415 S.E.2d 200 (1992), petition withdrawn, 333 N.C. 346, 429 S.E.2d 552 (1993).

Collateral Estoppel Not Available to Show Joint and Several Liability of One Not Made Defendant in Action. — Where, after wrongful death action in which mother was neither named as a defendant nor named as a third party defendant, and in which insured was found to have caused the death of child in a car accident, insurer sought contribution from mother for half of the money paid to the child's estate, the doctrine of collateral estoppel was not available to the insurer to show mother's joint and several liability to the estate of the child; since mother was not a party to the wrongful death claim and was not made a third party defendant for the purpose of contribution, neither her liability to the estate of child nor her liability to insurer as a joint tort-feasor was established by the judgment in the original action. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989).

Section 1B-4 Not Applicable Where Requirements of Subsection (e) Not Met. — Where plaintiff did not bring previous wrongful death action for death of his son on behalf of an injured minor or minor plaintiff as required by subsection (e) of this section, and consent judgment entered therein between himself and his wife, the defendant, did not specify that it was anything other than a judgment, § 1B-4 did not apply to the case which he subsequently brought against motorcycle dealer, manufacturer and credit company. Therefore, under subsection (e), the judgment entered therein was fully satisfied by the insurance company of plaintiff's wife, discharging defendants in the subsequent case from liability for the same injury or wrongful death. Severance v. Ford Motor Co., 98 N.C. App. 330, 390 S.E.2d 704 (1990).

§ 1B-4. Release or covenant not to sue.

CASE NOTES

Chapter Inapplicable in Contract Actions. — By its terms, this Chapter applies only in tort actions, not contract actions. Duke Univ. v. St. Paul Mercury Ins. Co., 95 N.C. App. 663, 384 S.E.2d 36 (1989).

Section Not Applicable Where Requirements of § 1B-3(e) Not Met. — Where plaintiff did not bring previous wrongful death action for death of his son on behalf of an injured minor or minor plaintiff as required by subsection (e) of this section, and consent judgment entered therein between himself and his wife, the defendant, did not specify that it was anything other than a judgment, § 1B-4 did not apply to the case which he subsequently brought against motorcycle dealer, manufacturer and credit company. Therefore, under subsection (e), the judgment entered therein was fully satisfied by the insurance company of plaintiff's wife, discharging defendants in the subsequent case from liability for the same injury or wrongful death. Severance v. Ford Motor Co., 98 N.C. App. 330, 390 S.E.2d 704 (1990).

This section permits a tort-feasor to enter into a good faith settlement and release with an injured party and relieve himself of further liability to remaining joint tort-feasors for contribution. Menard ex rel. Menard v. Johnson, 105 N.C. App. 70, 411 S.E.2d 825 (1992).

One Recovery for Each Injury. — North Carolina recognizes the common law principle of "one recovery" for each injury, even where the legislature has authorized damages that are punitive in character. Ferris v. Haymore, 967 F.2d 946 (4th Cir. 1992).

Trial court erred in not applying this section where, in their complaint, plaintiffs treated defendants as joint tort-feasors and sought relief from flood damage caused by mud and silt runoff from all defendants' properties, and evidence at trial revealed only single indivisible injury, the flooding of plaintiffs' property, and until appeal plaintiffs did not attempt to allocate their injury among defendants. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

A defendant who settles with a plaintiff and invokes this section to bar a cross claim for contribution from a co-defendant does not lose his rights to pursue his own cross claim or counterclaim against the same co-defendant for damages (personal and property) allegedly inflicted upon him by the co-defendant. Menard ex rel. Menard v. Johnson, 105 N.C. App. 70, 411 S.E.2d 825 (1992).

Claims for Injury or Damage Not Addressed. — The plain language of this section does not address cross claims or counterclaims for personal injury or property damage; this section only addresses the statutory right to contribution. Menard ex rel. Menard v. Johnson, 105 N.C. App. 70, 411 S.E.2d 825 (1992).

For defendant to be entitled to verdict reduction in the amount of a pretrial settlement between plaintiffs and two other defendants, it must not only appear that the three defendants are tort-feasors, but also that the negligence of all three defendants caused an indivisible injury. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

ARTICLE 2.

Judgment against Joint Obligors or Joint Tort-Feasors.

§ 1B-7. Payment of judgment by one of several.

CASE NOTES

Equitable Contribution. — Nothing on the face of this section, or in its history, indicates that the General Assembly intended to eliminate the right to seek equitable contribution. Holcomb v. Holcomb, 70 N.C. App. 471, 320 S.E.2d 12 (1984).

At no point did any prior version of the contribution statute, nor does the modern version, expressly or impliedly eliminate the equitable contribution action. Rather, equitable contribution has continued as an independent action, separate from the summary proceedings set out in statute for preserving the judgment. Holcomb v. Holcomb, 70 N.C. App. 471, 320 S.E.2d 12 (1984).

Chapter 1C.

Editor's Note. — The legislation and annotations affecting Chapter 1C have been included in a recently published replacement chapter.

Chapter 4.

Common Law.

§ 4-1. Common law declared to be in force.

Legal Periodicals. —

For article discussing the influence, past and future, of civil law on common law jurisdictions, see 1990 Duke L.J. 1207.

For note, "Its Days were Numbered: The Year and a Day Rule Falls in North Carolina — State v. Vance," see 14 Campbell L. Rev. 235 (1992).

CASE NOTES

I. General Consideration.
II. Illustrative Cases.
  B. Criminal.

I. GENERAL CONSIDERATION.

Historical Background. —

Since the American Revolution and our independence, the common law has continued to apply in North Carolina. Hall v. Post, 323 N.C. 259, 372 S.E.2d 711 (1988).

Applied in State v. Crawford, 329 N.C. 466, 406 S.E.2d 579 (1991).

Cited in State v. Mann, 317 N.C. 164, 345 S.E.2d 365 (1986); Cheape v. Town of Chapel Hill, 320 N.C. 549, 359 S.E.2d 792 (1987); State v. Beale, 324 N.C. 87, 376 S.E.2d 1 (1989); Hatcher v. Rose, 329 N.C. 626, 407 S.E.2d 172 (1991); State v. Lane, 115 N.C. App. 25, 444 S.E.2d 233 (1994).

II. ILLUSTRATIVE CASES.

B. Criminal.

The year and a day rule has become "obsolete," within the meaning of that term as used in this section, and is no longer part of the common law of North Carolina for any purpose. State v. Vance, 328 N.C. 613, 403 S.E.2d 495 (1991).

Chapter 5A.

Contempt.

Article 1.

Criminal Contempt.

Sec.
5A-11. Criminal contempt.
5A-12. Punishment; circumstances for fine or imprisonment; reduction of punishment; other measures.

Sec.
5A-15. Plenary proceedings for contempt.

Article 2.

Civil Contempt.

5A-22. Release when civil contempt no longer continues.
5A-23. Proceedings for civil contempt.

ARTICLE 1.

Criminal Contempt.

§ 5A-11. Criminal contempt.

(a) Except as provided in subsection (b), each of the following is criminal contempt:

(1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.

(2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.

(3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

(4) Willful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified.

(5) Willful publication of a report of the proceedings in a court that is grossly inaccurate and presents a clear and present danger of imminent and serious threat to the administration of justice, made with knowledge that it was false or with reckless disregard of whether it was false. No person, however, may be punished for publishing a truthful report of proceedings in a court.

(6) Willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction.

(7) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court.

(8) Willful refusal to testify or produce other information upon the order of a judge acting pursuant to Article 61 of Chapter 15A, Granting of Immunity to Witnesses.

(9) Willful communication with a juror in an improper attempt to influence his deliberations.

(9a) Willful refusal by a defendant to comply with a condition of probation.

(10) Any other act or omission specified elsewhere in the General Statutes of North Carolina as grounds for criminal contempt.

The grounds for criminal contempt specified here are exclusive, regardless of any other grounds for criminal contempt which existed at common law.

(b) No person may be held in contempt under this section on the basis of the content of any broadcast, publication, or other communication unless it presents a clear and present danger of an imminent and serious threat to the administration of criminal justice.

(c) This section is subject to the provisions of G.S. 7A-276.1, Court orders prohibiting publication or broadcast of reports of open court proceedings or reports of public records banned. (1977, c. 711, s. 3; 1994, Ex. Sess., c. 19, s. 1.)

Effect of Amendments. — The 1994 Extra Session amendment, effective May 1, 1994, and applicable to defendants sentenced on or after that date, added subdivision (a)(9a).

Legal Periodicals. — For article, "The Distinction Between Civil and Criminal Contempt in North Carolina," see 67 N.C.L. Rev. 1281 (1989).

CASE NOTES

I. General Consideration.
IV. Acts Constituting Contempt.
  A. In General.
  B. Disruptive Conduct.
  C. Disobedience of Orders.

I. GENERAL CONSIDERATION.

Notice of Charges and Opportunity to Be Heard. — The principles of due process require that before an attorney is finally adjudicated in contempt and sentenced after a trial for conduct during the trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987), 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

The superior court judge was well within the bounds of the court's inherent authority to manage the case docket when he struck defendant's answer as sanction for willful failure to execute agreed settlement because defendants offered no plausible excuse as to why they did not execute the two paragraph consent judgment, saying only that they did not understand it and in addition judge gave notice that failure to file consent order would result in the imposition of sanctions. Lomax v. Shaw, 101 N.C. App. 560, 400 S.E.2d 97 (1991).

Failure to Comply with Schedules. — The trial judge has the power to hold a party in contempt for willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court. Lomax v. Shaw, 101 N.C. App. 560, 400 S.E.2d 97 (1991).

Stated in In re Nakell, 104 N.C. App. 638, 411 S.E.2d 159 (1991).

Cited in State v. Brown, 110 N.C. App. 658, 430 S.E.2d 433 (1993).

IV. ACTS CONSTITUTING CONTEMPT.

A. In General.

In order for an act to be "willful," as the term is used in criminal law, it must be done deliberately and purposefully in violation of law, and without authority, justification or excuse. State v. Chriscoe, 85 N.C. App. 155, 354 S.E.2d 289 (1987).

"Grossly negligent," for purposes of criminal culpability, implies recklessness or carelessness that shows a thoughtless disregard of consequences or a heedless indifference to the rights of others. State v. Chriscoe, 85 N.C. App. 155, 354 S.E.2d 289 (1987).

Willfulness or Gross Negligence Not Shown. — Where evidence showed that defendant's short delay of an hour or an hour and a quarter in arriving at court was due, not merely to an absence of transportation, but also to her concern for her mother's safety brought about by her mother's failure to arrive on time or to answer the telephone, defendant's behavior did not rise to the level of willfulness or gross negligence. State v. Chriscoe, 85 N.C. App. 155, 354 S.E.2d 289 (1987).

B. Disruptive Conduct.

Employment of Individual to Disrupt Criminal Trial. — Evidence held sufficient to support the trial judge's finding that respondent attorney solicited an individual to disrupt the criminal trial of his client, thereby committing willful behavior during the sitting of a court which tended to interrupt its proceedings, in violation of subsection (a) of this section. In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987), 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

C. Disobedience of Orders.

Deliberate Disobedience Irrespective of Intent. — Attorney willfully disobeyed a lawful order of the court in a manner that was likely to interrupt the matters before the court where he deliberately disobeyed the judge's repeated orders to sit down and be quiet, and while it was unlikely that he intended any insult or injury to the court, he consciously disobeyed direct orders and was properly convicted of criminal contempt. Nakell v. Attorney General, 15 F.3d 319 (4th Cir.), cert. denied, — U.S. —, 115 S. Ct. 184, 130 L. Ed. 2d 118 (1994).

In the absence of an order to be present, defendant may not be held in contempt for violation of such an order. State v. Chriscoe, 85 N.C. App. 155, 354 S.E.2d 289 (1987).

Conditioning of Probation or Suspended Sentence on Contemnor's Purging Himself. — The imposition of probationary conditions under § 15A-1343 and the possibility of early termination under § 15A-1342(b) do not transform probationary or suspended sentences into civil relief. However, specifically conditioning the imposition or effect of the probationary or suspended sentence upon the contemnor's purging himself would constitute civil relief. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Order Allowing Defendant to Avoid Confinement by Paying Arrearages Held Remedial Relief. — Where the court ordered defendant confined in jail for a period of 29 days, but it allowed defendant to avoid that punishment altogether by paying the entire amount of child support arrearages, this constituted remedial relief and therefore required that the court's order be construed as adjudicating defendant in civil contempt. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Violations of Court's Holding Regarding Standing. — Where court repeatedly held that former corporation manager had no standing to appeal, but he continued to appeal every decision reached on behalf of corporate defendants in violation of court's orders, trial court had jurisdiction to consider criminal contempt based on corporation manager's repeated violations of the court's orders. Lowder v. All Star Mills, Inc., 100 N.C. App. 318, 396 S.E.2d 92 (1990).

Because an administrative agency of the State is not subject to contempt, respondent, a State employee who was dismissed from his job and later reinstated, could not petition the superior court for a show cause order against petitioner Department of Transportation ("DOT"), an administrative agency of the State, for contempt pursuant to this section or § 5A-21. North Carolina DOT v. Davenport, 334 N.C. 428, 432 S.E.2d 303 (1993).

§ 5A-12. Punishment; circumstances for fine or imprisonment; reduction of punishment; other measures.

(a) A person who commits criminal contempt, whether direct or indirect, is subject to censure, imprisonment up to 30 days, fine not to exceed five hundred dollars ($500.00), or any combination of the three, except that a person who commits a contempt described in G.S. 5A-11(8) is subject to censure, imprisonment not to exceed 6 months, fine not to exceed five hundred dollars ($500.00), or any combination of the three and a person who has not been arrested who fails to comply with a nontestimonial identification order, issued pursuant to Article 14 of G.S. 15A is subject to censure, imprisonment not to exceed 90 days, fine not to exceed five hundred dollars ($500.00), or any combination of the three.

(b) Except for contempt under G.S. 5A-11(5) or 5A-11(9), fine or imprisonment may not be imposed for criminal contempt, whether direct or indirect, unless:

(1) The act or omission was willfully contemptuous; or
(2) The act or omission was preceded by a clear warning by the court that the conduct is improper.

(c) The judicial official who finds a person in contempt may at any time withdraw a censure, terminate or reduce a sentence of imprisonment, or remit or reduce a fine imposed as punishment for contempt if warranted by the conduct of the contemnor and the ends of justice.

(d) A person held in criminal contempt under this Article may nevertheless, for the same conduct, be found in civil contempt under Article 2 of this Chapter, Civil Contempt. If a person is found in both civil contempt and criminal contempt for the same conduct, the total period of imprisonment is limited as provided in G.S. 5A-21(c).

(e) A person held in criminal contempt under G.S. 5A-11(9) may nevertheless, for the same conduct, be found guilty of a violation of G.S. 14-225.1, but he must be given credit for any imprisonment resulting from the contempt. (1977, c. 711, s. 3; 1985 (Reg. Sess., 1986), c. 843, s. 1; 1987 (Reg. Sess., 1988), c. 1040, s. 2.)

Editor's Note. —

Session Laws 1987 (Reg. Sess., 1988), c. 1040, s. 1, as amended by Session Laws 1989 (Reg. Sess., 1990), c. 1039, s. 4, extended the expiration date of Session Laws 1985 (Reg. Sess., 1986), c. 843, s. 6, as noted in the main volume, from October 1, 1988, to October 1, 1993. However, Session Laws 1987 (Reg. Sess., 1988), c. 1040, s. 2 amended subsection (a) of this section to read as it did prior to amendment by Session Laws 1985 (Reg. Sess., 1986), c. 843.

CASE NOTES

Punishment for Criminal and Civil Contempt, etc. —

A major factor in determining whether contempt is criminal or civil is the purpose for which the power is exercised. Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. The importance in distinguishing criminal and civil contempt lies in the difference in procedure, punishment and right of review. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Contempt may be of two kinds, civil or criminal, although the demarcation between the two may be hazy at best. Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Provision in a criminal contempt adjudication requiring defendant to pay $3,150 in damages to plaintiff was invalid, because this section limits the punishment that can be imposed for criminal contempts to a fine of $500 and 30 days in jail; and damages may not be awarded to a private party because of any contempt, which is an offense against the State. M.G. Newell Co. v. Wyrick, 91 N.C. App. 98, 370 S.E.2d 431 (1988).

Conditioning of Probation or Suspended Sentence on Contemnor's Purging Himself. — The imposition of probationary conditions under § 15A-1343 and the possibility of early termination under § 15A-1342(b) do not transform probationary or suspended sentences into civil relief. However, specifically conditioning the imposition or effect of the probationary or suspended sentence upon the contemnor's purging himself would constitute civil relief. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Order Allowing Defendant to Avoid Confinement by Paying Arrearages Held Remedial Relief. — Where the court ordered defendant confined in jail for a period of 29 days, but it allowed defendant to avoid that punishment altogether by paying the entire amount of child support arrearages, this constituted remedial relief and therefore required that the court's order be construed as adjudicating defendant in civil contempt. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

Where the judge converted an entry into a final judgment, the violation of which subjected the defendant to criminal contempt of court, punishable under subsection (a), the trial court erred when it imposed a term of imprisonment of six months, suspended for five years under the supervision of a probation officer; therefore, the case was remanded for a hearing on contempt pursuant to § 5A-11(a)(3). State v. Brown, 110 N.C. App. 658, 430 S.E.2d 433 (1993).

Cited in North Carolina DOT v. Davenport, 334 N.C. 428, 432 S.E.2d 303 (1993).

§ 5A-13. Direct and indirect criminal contempt; proceedings required.

CASE NOTES

Defendant's failure to appear at a show cause hearing was classified as indirect criminal contempt since trial judge had no direct knowledge of facts which would establish that defendant's failure to appear was willful. Cox v. Cox, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

Deliberate Disobedience Irrespective of Intent. — Attorney willfully disobeyed a lawful order of the court in a manner that was likely to interrupt the matters before the court where he deliberately disobeyed the judge's repeated orders to sit down and be quiet, and while it was unlikely that he intended any insult or injury to the court, he consciously disobeyed direct orders and was properly convicted of criminal contempt. Nakell v. Attorney General, 15 F.3d 319 (4th Cir.), cert. denied, — U.S. —, 115 S. Ct. 184, 130 L. Ed. 2d 118 (1994).

Requirements of Due Process. — The requirements of due process are met when one charged with contempt is afforded notice and an opportunity to be heard; delayed summary contempt proceedings are also consistent with due process. Nakell v. Attorney General, 15 F.3d 319 (4th Cir.), cert. denied, — U.S. —, 115 S. Ct. 184, 130 L. Ed. 2d 118 (1994).

§ 5A-14. Summary proceedings for contempt.

CASE NOTES

Cited in Cox v. Cox, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

§ 5A-15. Plenary proceedings for contempt.

(a) When a judicial official chooses not to proceed summarily against a person charged with direct criminal contempt or when he may not proceed summarily, he may proceed by an order directing the person to appear before a judge at a reasonable time specified in the order and show cause why he should not be held in contempt of court. A copy of the order must be furnished to the person charged. If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge.

(b) Proceedings under this section are before a district court judge unless a court superior to the district court issued the order, in which case the proceedings are before that court. Venue lies throughout the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where the order was issued.

(c) The person ordered to show cause may move to dismiss the order.

(d) The judge is the trier of facts at the show cause hearing.

(e) The person charged with contempt may not be compelled to be a witness against himself in the hearing.

(f) At the conclusion of the hearing, the judge must enter a finding of guilty or not guilty. If the person is found to be in contempt, the judge must make findings of fact and enter judgment. The facts must be established beyond a reasonable doubt.

(g) The judge presiding over the hearing may appoint a prosecutor or, in the event of an apparent conflict of interest, some other member of the bar to represent the court in hearings for criminal contempt. (1977, c. 711, s. 3; 1987 (Reg. Sess., 1988), c. 1037, s. 44.)

CASE NOTES

Notice of Charges and Opportunity to Be Heard. — The principles of due process require that before an attorney is finally adjudicated in contempt and sentenced after a trial for conduct during the trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987), 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

Applied in Cox v. Cox, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

Cited in State v. Fie, 320 N.C. 626, 359 S.E.2d 774 (1987); Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988); Hartsell v. Hartsell, 99 N.C. App. 380, 393 S.E.2d 570 (1990).

§ 5A-17. Appeals.

Legal Periodicals. — For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

CASE NOTES

Quoted in State v. Mauney, 106 N.C. App. 26, 415 S.E.2d 208 (1992).

Cited in Hammock v. Bencini, 98 N.C. App. 510, 391 S.E.2d 210 (1990); Vaughn v. Vaughn, 99 N.C. App. 574, 393 S.E.2d 567 (1990).

ARTICLE 2.

Civil Contempt.

§ 5A-21. Civil contempt; imprisonment to compel compliance.

Legal Periodicals. — For article, "The Distinction Between Civil and Criminal Contempt in North Carolina," see 67 N.C.L. Rev. 1281 (1989).

CASE NOTES

I. General Consideration.
II. Orders Enforceable as Civil Contempt.
III. Purging Contempt.
IV. Practice and Procedure.
V. Appeal and Error.

I. GENERAL CONSIDERATION.

An administrative agency of the State is not subject to contempt. North Carolina DOT v. Davenport, 334 N.C. 428, 432 S.E.2d 303 (1993).

Disobedience Must Be Willful. — In accord with second paragraph in the main volume. See Harris v. Harris, 91 N.C. App. 699, 373 S.E.2d 312 (1988).

Thus, Defendant Must Possess Means, etc. — The purpose of civil contempt is to coerce compliance with a court order; therefore, present ability or means to satisfy that order is essential. Adkins v. Adkins, 82 N.C. App. 289, 346 S.E.2d 220 (1986).

Conduct Held Willful. — Defendant's voluntary purging of assets in bankruptcy was considered a deliberate divestment of assets; therefore, failure to comply with a child support order was willful and punishable by contempt proceedings. Harris v. Harris, 91 N.C. App. 699, 373 S.E.2d 312 (1988).

Findings on Means to Comply Held Adequate. — Trial court's finding regarding contemnor's "present means to comply" held minimally sufficient to satisfy the statutory requirement for civil contempt, although specific findings supporting the contemnor's present means are preferable. Adkins v. Adkins, 82 N.C. App. 289, 346 S.E.2d 220 (1986).

No Authority to Award Costs to Private Party in Contempt Proceeding. — A North Carolina court has no authority to award damages in the form of costs to a private party in a contempt proceeding. Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

Although labeled "civil" contempt, a proceeding as for contempt is by no means a civil action or proceeding to which § 6-18 (when costs shall be allowed to plaintiff as a matter of course) or § 6-20 (allowance of costs in discretion of court) would apply. Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

Court Not Authorized to Award Attorneys' Fees. — In a contempt action for the enforcement of a consent judgment regarding defendant's obligation to pay daughter's college tuition, the trial court was without authority to award the plaintiff attorneys' fees. Powers v. Powers, 103 N.C. App. 697, 407 S.E.2d 269 (1991).

Consent Judgment Not Enforceable Through Contempt Powers. — Where the judgment on which the trial court based its contempt order did not reflect a determination by the trial court of either issues of fact or conclusions of law presented by the case before it, the order was merely a recital of the parties' agreement and not an adjudication of rights. Consequently, the consent judgment was not an order enforceable through the contempt powers of the court. Crane v. Green, 114 N.C. App. 105, 441 S.E.2d 144 (1994).

II. ORDERS ENFORCEABLE AS CIVIL CONTEMPT.

Order Allowing Defendant to Avoid Confinement by Paying Arrearages Held Remedial Relief. — Where the court ordered defendant confined in jail for a period of 29 days, but it allowed defendant to avoid that punishment altogether by paying the entire amount of child support arrearages, this constituted remedial relief and therefore required that the court's order be construed as adjudicating defendant in civil contempt. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

III. PURGING CONTEMPT.

Conditioning of Probation or Suspended Sentence on Contemnor's Purging Himself. — The imposition of probationary conditions under § 15A-1343 and the possibility of early termination under § 15A-1342(b) do not transform probationary or suspended sentences into civil relief. However, specifically conditioning the imposition or effect of the probationary or suspended sentence upon the contemnor's purging himself would constitute civil relief. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

IV. PRACTICE AND PROCEDURE.

Where the trial court made no findings of defendant's ability to pay the entire arrearage arising from nonpayment of child support, the Court of Appeals was required to conclude that there were inadequate findings to support the adjudication of civil contempt. Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

V. APPEAL AND ERROR.

Scope of Review. —

In accord with the main volume. See Adkins v. Adkins, 82 N.C. App. 289, 346 S.E.2d 220 (1986).

§ 5A-22. Release when civil contempt no longer continues.

(a) A person imprisoned for civil contempt must be released when his civil contempt no longer continues. The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt. Upon finding compliance with the specifications, the sheriff or other officer having custody may release the person without a further order from the court.

(b) On motion of the contemnor, the court must determine if he is subject to release and, on an affirmative determination, order his release. The motion must be directed to the judge who found civil contempt unless he is not available. Then the motion must be made to a judge of the same division in the same district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be. The contemnor may also seek his release under other procedures available under the law of this State. (1977, c. 711, s. 3; 1987 (Reg. Sess., 1988), c. 1037, s. 45.)

CASE NOTES

Trial Court Without Authority to Require Contemnor to Pay Compensatory Damages. — Upon a finding of contempt, in situations where the original order requires a transfer of property (including intangible property such as that represented by stock certificates), the trial court has authority to order the contemnor to transfer said property as a condition of purging the contempt, but does not have authority to require the contemnor to pay compensatory damages incurred as a result of his noncompliance with the original order. Hartsell v. Hartsell, 99 N.C. App. 380, 393 S.E.2d 570 (1990), aff'd, 328 N.C. 729, 403 S.E.2d 307 (1991).

Cited in Leonard v. Hammond, 804 F.2d 838 (4th Cir. 1986).

§ 5A-23. Proceedings for civil contempt.

(a) Proceedings for civil contempt are either by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt or by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt. The order or notice must be given at least five days in advance of the hearing unless good cause is shown. The order or notice may be issued on the motion and sworn statement or affidavit of one with an interest in enforcing the order, including a judge, and a finding by the judicial official of probable cause to believe there is civil contempt.

(b) Except when the General Statutes specifically provide for the exercise of contempt power by the clerk of superior court, proceedings under this section are before a district court judge, unless a court superior to the district court issued the order in which case the proceedings are before that court. When the proceedings are before a superior court, venue is in the superior court district or set of districts as defined in G.S. 7A-41.1 of the court which issued the order. Otherwise, venue is in the county where the order was issued.

(c) The person ordered to show cause may move to dismiss the order.

(d) The judicial official is the trier of facts at the show cause hearing.

(e) At the conclusion of the hearing, the judicial official must enter a finding for or against the alleged contemnor. If civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the action which the contemnor must take to purge himself of the contempt.

(f) A person with an interest in enforcing the order may present the case for a finding of civil contempt for failure to comply with an order.

(g) A judge conducting a hearing to determine if a person is in civil contempt may at that hearing, upon making the required findings, find the person in criminal contempt for the same conduct, regardless of whether imprisonment for civil contempt is proper in the case. (1977, c. 711, s. 3; 1979, 2nd Sess., c. 1080, ss. 2-4; 1987 (Reg. Sess., 1988), c. 1037, s. 46.)

CASE NOTES

Defendant's Rights Under U.S. Const., Amend. V Not Implicated in Civil Contempt Case. — Where trial court ordered defendant incarcerated, gave defendant the opportunity to purge his contempt by complying with prior consent order and paying certain sums for attorney's fees and damages, and imposed no other penalty, the relief granted was wholly civil in nature. Since defendant was not, in fact, subject to criminal penalties, there was no necessity to examine whether defendant's rights under U.S. Const., Amend. V were adequately protected during the contempt proceeding. Hartsell v. Hartsell, 99 N.C. App. 380, 393 S.E.2d 570 (1990), aff'd, 328 N.C. 729, 403 S.E.2d 307 (1991).

Judge was authorized to shorten notice period of civil contempt hearing for good cause, where the defendant had known for several months of the particular charges pending against him and had had ample opportunity to prepare to meet them, where all the witnesses, some of whom had been in court on earlier occasions, were present, along with the parties, and where defendant's lawyer acknowledged that his argument for delaying the hearing was based, not upon any unreadiness to proceed, but upon his mistaken impression that a hearing upon less than five days notice was automatically invalid. M.G. Newell Co. v. Wyrick, 91 N.C. App. 98, 370 S.E.2d 431 (1988).

Defendant Held Not Entitled to Notice. — Where the defendant had notice of civil contempt hearing and he was simultaneously adjudged to be in both civil and criminal contempt, defendant was entitled to no notice as to the criminal contempt, as subsection (g) of this section expressly authorizes a judge conducting a hearing to determine civil contempt to "find the person in criminal contempt for the same conduct" upon making the required findings. M.G. Newell Co. v. Wyrick, 91 N.C. App. 98, 370 S.E.2d 431 (1988).

§ 5A-24. Appeals.

Legal Periodicals. — For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

CASE NOTES

Quoted in State v. Mauney, 106 N.C. App. 26, 415 S.E.2d 208 (1992).

Cited in Crane v. Green, 114 N.C. App. 105, 441 S.E.2d 144 (1994).

Chapter 6.

Liability for Court Costs.

Article 3.

Civil Actions and Proceedings.

Sec.
6-19.2. [Repealed.]
6-21.3. Remedies for returned check.
6-24. Suits by an indigent; payment of costs by an indigent.

ARTICLE 1.

Generally.

§ 6-1. Items allowed as costs.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Trial judges are authorized to tax court costs, and if the court misused its authority in taxing costs against pauper plaintiff, that error was waived by her failure to appeal therefrom. Schaffner v. Pantelakos, 98 N.C. App. 399, 391 S.E.2d 41 (1990).

ARTICLE 3.

Civil Actions and Proceedings.

§ 6-18. When costs allowed as of course to plaintiff.

Legal Periodicals. — For article, "Awarding Attorney Fees Against Adversaries: Introducing the Problem," see 1986 Duke L.J. 435.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Section Inapplicable to Contempt Proceeding. —

In accord with the main volume. See Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

A North Carolina court has no authority to award damages in the form of costs to a private party in a contempt proceeding. Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

Cited in Alsup v. Pitman, 98 N.C. App. 389, 390 S.E.2d 750 (1990); Powers v. Powers, 103 N.C. App. 697, 407 S.E.2d 269 (1991); Smith v. McDonald, 767 F. Supp. 732 (M.D. N.C. 1991).

§ 6-19. When costs allowed as of course to defendant.

CASE NOTES

Cited in Smith v. McDonald, 767 F. Supp. 732 (M.D. N.C. 1991).

§ 6-19.1. Attorney's fees to parties appealing or defending against agency decision.

CASE NOTES

Motion Timely. — Petitioner's motion for attorney's fees, filed well before final judgment, was timely; therefore, the trial court had jurisdiction to hear the matter. Whiteco Indus., Inc. v. Harrelson, 111 N.C. App. 815, 434 S.E.2d 229 (1993); Whiteco Indus., Inc. v. Harrington, 111 N.C. App. 839, 434 S.E.2d 234 (1993), cert. granted, 335 N.C. 565, 441 S.E.2d 135 (1994).

Three criteria must exist before a trial judge can exercise its statutory discretion to award fees under this section. First, the party moving for attorney's fees must be a "prevailing party;" second, the court must find that the agency acted without substantial justification; and third the court must find that there are no special circumstances making a fee award unjust. Employment Sec. Comm'n v. Peace, 115 N.C. App. 486, 445 S.E.2d 84, cert. denied, 338 N.C. 667, 453 S.E.2d 176 (1994).

Applied in Tay v. Flaherty, 100 N.C. App. 51, 394 S.E.2d 217 (1990); State ex rel. Envtl. Mgt. Comm'n v. House of Raeford Farms, Inc., 101 N.C. App. 433, 400 S.E.2d 107; Able Outdoor, Inc. v. Harrelson, 113 N.C. App. 483, 439 S.E.2d 245 (1994); Crowell Constructors, Inc. v. State ex rel. Cobey, 114 N.C. App. 75, 440 S.E.2d 848 (1994).

Stated in S.E.T.A. UNC-CH, Inc. v. Huffines, 107 N.C. App. 440, 420 S.E.2d 674 (1992).

Cited in In re Magee, 87 N.C. App. 650, 362 S.E.2d 564 (1987).

§ 6-19.2: Repealed by Session Laws 1995, c. 388, s. 6, effective October 1, 1995.

§ 6-20. Costs allowed or not, in discretion of court.

CASE NOTES

Section Inapplicable to Contempt Proceeding. —

In accord with the main volume. See Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

A North Carolina court has no authority to award damages in the form of costs to a private party in a contempt proceeding. Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

Section 7A-320 Does Not Abrogate Court's Authority Under This Section. — Under § 7A-305, which specifies in subsection (d) the costs recoverable in civil actions, and also provides in subsection (e) that nothing in this section shall affect the liability of the respective parties for costs as provided by law, the authority of trial courts to tax deposition expenses as costs pursuant to § 6-20 remains undisturbed, regardless of the language of § 7A-320. Alsup v. Pitman, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

Deposition Expenses. —

In accord with the main volume. See Alsup v. Pitman, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

This section authorizes trial courts to tax deposition expenses as costs. Alsup v. Pitman, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

Trial court had full authority to tax, in its discretion, deposition expenses as costs pursuant to §§ 1A-1, Rule 41(d) and 6-20. Alsup v. Pitman, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

Award of Costs for Expert Witnesses. — For case upholding award to plaintiffs as costs of charges of expert witnesses for time spent outside trial and expenses for expert witnesses who testified about the standard of care applicable to nurses in similar communities, see Campbell ex rel. McMillan v. Pitt County Mem. Hosp., 84 N.C. App. 314, 352 S.E.2d 902, aff'd, 321 N.C. 260, 362 S.E.2d 273 (1987), overruled on other grounds, Johnson v. Ruark Ob. & Gyn. Assocs., 327 N.C. 283, 395 S.E.2d 85 (1990), rehearing denied, 327 N.C. 644, 399 S.E.2d 133 (1990).

Applied in True v. T & W Textile Mach., Inc., 112 N.C. App. 358, 435 S.E.2d 551 (1993), cert. granted, 335 N.C. 555, 441 S.E.2d 134, aff'd per curiam, 337 N.C. 798, 448 S.E.2d 514 (1994).

Cited in Brown v. Rhyne Floral Supply Mfg. Co., 89 N.C. App. 717, 366 S.E.2d 894 (1988); Powers v. Powers, 103 N.C. App. 697, 407 S.E.2d 269 (1991); Brandenburg Land Co. v. Champion Int'l Corp., 107 N.C. App. 102, 418 S.E.2d 526 (1992); Wachovia Bank v. Bob Dunn Jaguar, Inc., 117 N.C. App. 165, 450 S.E.2d 527 (1994).

§ 6-21. Costs allowed either party or apportioned in discretion of court.

Legal Periodicals. —

For note, "A Public Goods Approach to Calculating Reasonable Fees under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

CASE NOTES

I. General Consideration.
II. Costs In Particular Actions.
  A. Caveats to Wills.
  G. Actions Not Covered by This Section.
  H. Illegitimate Children.
III. Procedure.

I. GENERAL CONSIDERATION.

Attorneys' Fees Properly Awarded to Defendant in Proceeding Under Chapter 156. — Assuming that § 105-374(i) is incorporated by reference into Chapter 156, because the section provides for attorneys' fees for taxing authorities does not mean that it prohibits attorneys' fees being taxed as part of the costs for members of drainage districts. Northampton County Drainage Dist. Number One v. Bailey, 326 N.C. 742, 392 S.E.2d 352 (1990).

Fees for Services Pursuant to Void Contract. — A trial court has no discretion to award statutory legal fees for services rendered in a child custody and support action pursuant to a contract void as against public policy. Davis v. Taylor, 81 N.C. App. 42, 344 S.E.2d 19, cert. denied, 318 N.C. 414, 349 S.E.2d 593 (1986).

Attorneys' Fees and Costs in Drainage Law. — This section provides for an award of costs in all actions under the drainage chapter and authorizes award of attorneys' fees to members of drainage district in action brought by district seeking to collect unpaid assessments and § 105-374(i) even if incorporated by reference into Chapter 156 does not prohibit attorneys' fees from being taxed as part of the costs for members of drainage districts. Northampton County Drainage Dist. Number One v. Bailey, 326 N.C. 742, 392 S.E.2d 352 (1990).

Judicial Review. — If the findings of the superior court regarding an award of attorney's fees in a caveat proceeding are supported by the evidence the reviewing court cannot disturb them. Dyer v. State, 331 N.C. 374, 416 S.E.2d 1 (1992).

Applied in Lash ex rel. Wilson v. Lash, 107 N.C. App. 755, 421 S.E.2d 615 (1992); Beau Rivage Plantation, Inc. v. Melex USA, Inc., 112 N.C. App. 446, 436 S.E.2d 152 (1993).

Cited in Casstevens v. Wagoner, 99 N.C. App. 337, 392 S.E.2d 776 (1990).

II. COSTS IN PARTICULAR ACTIONS.

A. Caveats to Wills.

As long as a dissent has substantial merit, the court may exercise its discretion in awarding reasonable attorneys' fees. In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. dismissed, 331 N.C. 748, 417 S.E.2d 236 (1992).

The substantial merit requirement under subdivision (2) of this section does not mean success on the merits; in its sound discretion, the trial court may award attorneys' fees even to unsuccessful caveators. In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. dismissed, 331 N.C. 748, 417 S.E.2d 236 (1992).

Expense of Caveat Not Cost of Administration. — Costs of administration, as used in § 29-2(5), means those ordinary, usual, and necessary expenses of administering a decedent's estate; a will caveat and its expense is neither of these, for a will caveat is a claim that the will involved is invalid, and its expense is a cost of court taxable against either party, or apportioned among the parties, in the discretion of the court. In re Estate of Ward, 97 N.C. App. 660, 389 S.E.2d 441 (1990).

"Common Fund" Not Prerequisite to Award of Costs. — There is no requirement in subdivision (2) of this section that a "common fund be available before costs may be awarded." McNaull v. McNaull, 94 N.C. App. 547, 380 S.E.2d 590, cert. denied, 325 N.C. 546, 385 S.E.2d 498 (1989).

Standing to Stipulate to Payment of Attorneys' Fees. — Where estate was taxed with the payment of attorneys' fees pursuant to subdivision (2) of this section, the attorneys' fees were considered to be an item of costs, and since the clerk's order indicated that the attorneys' fees should be paid directly to the law firm involved, and not to the dissenter, only the law firm could stipulate that the clerk's order had been satisfied. In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. dismissed, 331 N.C. 748, 417 S.E.2d 236 (1992).

Caveators Should Have Been Apprised of Court's Determination Regarding Fees. — Where the trial court permitted an attorney for all the named caveators to withdraw as counsel of record for certain caveators, implicit in that decision was permission for these caveators to retain their own counsel; therefore, if at the outset of the trial, the court determined that there was duplicity on the part of all counsel in its representation of the caveators, then the caveators should have been apprised that such a determination by the trial court might result in the denial of attorney fees pursuant to subsection (2) of this section, rather than for the trial court to summarily deny a successor law firm's request for fees at the conclusion of the matter. Hill v. Cox, 108 N.C. App. 454, 424 S.E.2d 201 (1993).

Trial Court Abused Its Discretion. — The trial court abused its discretion by denying a petition of a law firm for approval and award of legal expenses where the trial court implicitly found that the caveat proceeding had substantial merit and where there was evidence that the law firm performed substantial services on behalf of the caveators it represented. Hill v. Cox, 108 N.C. App. 454, 424 S.E.2d 201 (1993).

G. Actions Not Covered by This Section.

Court's order that defendant pay legal fees incurred by executor after defendant's default at judicial sale of estate's real and personal property held unauthorized. Parker v. Lippard, 87 N.C. App. 43, 359 S.E.2d 492, modified, 87 N.C. App. 487, 361 S.E.2d 395 (1987).

In declaratory judgment action in which plaintiff sought division of a federal income tax refund pursuant to §§ 28A-15-6 and 28A-15-9, plaintiff was not entitled to attorney's fees under this section. Brantley v. Watson, 115 N.C. App. 393, 445 S.E.2d 53 (1994).

H. Illegitimate Children.

Attorneys' fees incurred in prosecuting paternity actions may not be awarded under § 50-13.6, but may only be assessed as costs under subdivision (10) of this section. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

III. PROCEDURE.

Caveat Proceeding. — A caveat proceeding has substantial merit if there is substantial evidence to support the claim. Dyer v. State, 102 N.C. App. 480, 402 S.E.2d 464, rev'd on other grounds, Dyer v. State, 331 N.C. 374, 416 S.E.2d 1 (1992).

Whether a caveat proceeding has substantial merit is a legal question reviewable by the appellate courts de novo. Dyer v. State, 102 N.C. App. 480, 402 S.E.2d 464, rev'd on other grounds, Dyer v. State, 331 N.C. 374, 416 S.E.2d 1 (1992).

§ 6-21.1. Allowance of counsel fees as part of costs in certain cases.

Legal Periodicals. —

For note, "Bad Faith Refusal to Pay First-Party Insurance Claims: A Growing Recognition of Extra-Contract Damages," see 64 N.C.L. Rev. 1421 (1986).

For article, "North Carolina's Cautious Approach Toward the Imposition of Extracontract Liability on Insurers for Bad Faith," see 21 Wake Forest L. Rev. 957 (1986).

For note, "A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

CASE NOTES

I. General Consideration.
III. Procedure.
IV. Settlement.

I. GENERAL CONSIDERATION.

This section refers only to the amount of the judgment, not to the amount of the verdict. Wells v. Jackson, 85 N.C. App. 718, 355 S.E.2d 837 (1987).

To overturn trial judge's determination, etc. —

Without a showing of abuse of trial judge's discretion, trial judge's determination to award counsel fees will not be overturned. Whitfield v. Nationwide Mut. Ins. Co., 86 N.C. App. 466, 358 S.E.2d 92 (1987).

Order denying motion pending remand to arbitrator was error. — Judge's order denying plaintiff's motion for attorney's fees "pending remand to the Arbitrator for a further determination" was error. This section requires the judge upon motion made to award attorney's fees as a part of the costs. Bass v. Goss, 105 N.C. App. 242, 412 S.E.2d 145 (1992).

When Insurance Company Not Required to Defend. — Where an insurance company utilized § 20-279.21 (b)(3)a to provide a defense to the insured party, it was a party in the tort actions, although unnamed; therefore, although it was not required to defend the lawsuit, but chose to do so, by so doing it became a defendant and liable for attorney's fees and costs. Turnage ex rel. Turnage v. Nationwide Mut. Ins. Co., 109 N.C. App. 300, 426 S.E.2d 433, aff'd per curiam, 335 N.C. 168, 435 S.E.2d 772 (1993).

Action Heard Before Arbitrator. — In a civil action heard before an arbitrator where the plaintiff was awarded less than $10,000, a judge had discretion whether to and in what amount to award attorney's fees. Bass v. Goss, 105 N.C. App. 242, 412 S.E.2d 145 (1992).

Attorneys' Fees in Actions Under Tort Claims Act. — The Industrial Commission has jurisdiction and authority to award attorneys' fees pursuant to this section for actions brought under the Tort Claims Act. Karp v. University of N.C., 88 N.C. App. 282, 362 S.E.2d 825 (1987), aff'd, 323 N.C. 473, 373 S.E.2d 430 (1988).

Defendants Prevailing on Counterclaim for Less Than Amount Sought. — Plaintiff's contention that the legislature did not intend for defendants to be able to collect attorneys' fees when they have prevailed on counterclaims for less than the stated amount was without merit. Mickens v. Robinson, 103 N.C. App. 52, 404 S.E.2d 359 (1991).

Abuse of Discretion. — Because defendant was not entitled to recover attorney's fees for defending against plaintiff's claim and because the amount of attorney's fees sought by defendant represented the cost for defending against plaintiff's claim as well as prosecuting defendant's counterclaim, the trial court necessarily abused its discretion in awarding defendant the full amount sought. Mishoe v. Sikes, 115 N.C. App. 697, 446 S.E.2d 114 (1994).

Applied in First Union Nat'l Bank v. Richards, 90 N.C. App. 650, 369 S.E.2d 620 (1988).

Stated in Davis v. Sellers, 115 N.C. App. 1, 443 S.E.2d 879 (1994), cert. denied, 339 N.C. 610, 454 S.E.2d 248 (1995).

Cited in City Fin. Co. v. Boykin, 86 N.C. App. 466, 358 S.E.2d 83 (1987); Tay v. Flaherty, 100 N.C. App. 51, 394 S.E.2d 217 (1990); Poole v. Miller, 116 N.C. App. 435, 448 S.E.2d 123, cert. granted, 338 N.C. 668, 453 S.E.2d 179 (1994); Benton

v. Thomerson, 339 N.C. 598, 453 S.E.2d 161 (1995).

III. PROCEDURE.

Findings Regarding the Allocation of Time. — Although a trial court is not necessarily required to make specific findings as to the allocation of time for attorney's fees in its award of attorney's fees under this section, the court must still carefully review the attorney's hours and determine the amount of fees to be awarded that represents, in the court's opinion, the legal fees to be awarded for obtaining a judgment whether from a complaint or a counterclaim. Mishoe v. Sikes, 115 N.C. App. 697, 446 S.E.2d 114 (1994).

And Such Findings May, etc. —

Because this statute defines the circumstances under which attorneys' fees may be awarded, the trial court is not required to make specific findings as to the plaintiff's entitlement to such an award. Epps v. Ewers, 90 N.C. App. 597, 369 S.E.2d 104 (1988).

Trial court was not required to make findings of fact allocating the time spent on a case between work required to defend against plaintiff's claim and that required to forward defendant's counterclaim when awarding attorneys' fees to defendant. Mickens v. Robinson, 103 N.C. App. 52, 404 S.E.2d 359 (1991).

Finding Insufficient to Award Attorneys' Fees. — Where the only findings of fact in support of the amount of the award for attorneys' fees were that plaintiff's attorney "provided good and valuable services"; that the reasonable value of the services provided by plaintiff's attorney was $2,000.00; and that plaintiff's fee contract with her attorney provided for a contingent fee of one-third of the damage award, those findings were not sufficient to support an award of $2,000. Epps v. Ewers, 90 N.C. App. 597, 369 S.E.2d 104 (1988).

Award Upheld. — Where defendant's attorneys presented evidence tending to show that they were entitled to a fee of $8000 for their work, and the trial court, after having carefully reviewed petitioner's hours, awarded $5000, there was no abuse of discretion in the award. Mickens v. Robinson, 103 N.C. App. 52, 404 S.E.2d 359 (1991).

IV. SETTLEMENT.

Attorney's Fees, etc. —

Attorneys' fees may be awarded pursuant to this statute even when damages are recovered by settlement prior to trial. In accord with 1993 Cumulative Supplement. See Benton v. Thomerson, 113 N.C. App. 293, 438 S.E.2d 434 (1994), rev'd on other grounds, 339 N.C. 598, 453 S.E.2d 161 (1995).

Amount of Settlement Irrelevant to Determination to Award Attorneys' Fees. — The amount of the final settlements in a civil suit was irrelevant in determining whether to award attorneys' fees. Epps v. Ewers, 90 N.C. App. 597, 369 S.E.2d 104 (1988).

There was no unwarranted refusal to settle where insurance company settled within four months of the accident and for a reasonable amount, as evidenced by the similarity between the jury verdict and the settlement amount. Benton v. Thomerson, 113 N.C. App. 293, 438 S.E.2d 434 (1994), rev'd on other grounds, 339 N.C. 598, 453 S.E.2d 161 (1995).

§ 6-21.2. Attorneys' fees in notes, etc., in addition to interest.

Legal Periodicals. —

For note, "Preemption of State Law Notice Provisions Governing the Recovery of Attorneys' Fees by Section 506(b) of the Bankruptcy Code," see 1 Duke L.J. 176 (1986).

For note, "A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

For survey on the award of attorneys' fees for breach of a separation agreement, see 70 N.C.L. Rev. 2016 (1992).

CASE NOTES

This Section Compared to § 1-567.11. — This section generally relates to and concerns the subject of attorneys' fees for legal work performed in the collection of indebtedness under various contractual arrangements and, unlike

§ 1-567.11, does not specifically address or relate to the subject of arbitration or attorneys' fees through arbitration. Nucor Corp. v. General Bearing Corp., 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

Reasonableness is the key factor under all attorney's fees statutes. Institution Food House, Inc. v. Circus Hall of Cream, Inc., 107 N.C. App. 552, 421 S.E.2d 370 (1992).

Section Not Applicable for Recovery upon Default of Purchase Money Deed of Trust. — This section deals in general and comprehensive terms with the propriety of attorneys' fees arising from the collection of indebtedness and, therefore, was not controlling in a case in which a seller of real property had accepted a purchase money deed of trust from his buyer and then sought recovery upon default; § 45-21.38 deals with just such a particular situation. Merritt v. Ridge, 323 N.C. 330, 372 S.E.2d 559 (1988).

This section does not apply to arbitration proceedings; thus, in arbitration proceedings, both the arbitrator or arbitration panel and the superior courts upon confirmation are limited to applying only § 1-567.11 in determining whether attorneys' fees should be or were properly awarded. Nucor Corp. v. General Bearing Corp., 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

Attorneys' Fees of Purchase Money Creditor Not Secured Obligation. — Where a promissory note states on its face that it is "given as purchase money, and is secured by a purchase money deed of trust," and the note is incorporated by reference into the deed of trust, attorneys' fees are not part of the purchase price. Hence, even if the trustee were to foreclose on the purchase money deed of trust, the purchase money creditor's attorneys' fees would not be a secured obligation. Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991).

Attorneys' fees provided for in an agreement to settle litigation already underway were not "obligations to pay attorneys' fees upon any note ... or other evidence of indebtedness" under this section. Without undermining the intent or force of this section, parties may, in settling disputes, agree to the payment of attorneys' fees; such a case is not controlled by this section. Carter v. Foster, 103 N.C. App. 110, 404 S.E.2d 484 (1991).

Choice of Law. — The issue of a party's entitlement to attorneys' fees is a question of substantive law. Tolaram Fibers, Inc. v. Tandy Corp., 92 N.C. App. 713, 375 S.E.2d 673, cert. denied, 324 N.C. 436, 379 S.E.2d 249 (1989).

Counsel fees are not a subject of arbitration, even where the contract provides that the owner will pay reasonable attorneys' fees incurred by the contractor for the collection of any defaulted payment due to the contractor by the owner as a result of the contract. In North Carolina, such attorneys' fees are collectible only under this section. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815 (1987), cert. denied, 320 N.C. 798, 361 S.E.2d 75 (1987), aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1989).

Meaning of "Evidence of Indebtedness." —

In accord with first paragraph in the main volume. See G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75 (1987).

Same — Formal credit agreement, etc. —

In accord with the main volume. See W.S. Clark & Sons v. Ruiz, 87 N.C. App. 420, 360 S.E.2d 814 (1987).

Same — Stock Purchase Agreement. — A stock purchase agreement was an "evidence of indebtedness" within the contemplation of this section. Nucor Corp. v. General Bearing Corp., 103 N.C. App. 518, 405 S.E.2d 776 (1991), rev'd on other grounds, 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

Award of Percentage Specified in Subdivision (2). — Subdivision (2) of section expressly provides that when a contract authorizing attorneys' fees does not specify the fee percentage, that it shall be construed to mean 15% of the "outstanding balance" owed on the obligation involved. A court which, in setting the fee, merely followed the statutory mandate would not be reversed. Nucor Corp. v. General Bearing Corp., 103 N.C. App. 518, 405 S.E.2d 776 (1991), rev'd on other grounds, 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

If a lease refers to "reasonable attorney's fees" and does not stipulate a specific percentage, subdivision (2) applies and the amount of attorneys' fees is 15% of the outstanding balance. Devereux

Properties, Inc. v. BBM & W, Inc., 114 N.C. App. 621, 442 S.E.2d 555, cert. denied, 337 N.C. 690, 448 S.E.2d 519 (1994).

Construction of Subdivision (5). — The notice provision of subdivision (5) of this section simply provides that the obligor will have five days' notice to pay any outstanding balance on the debt before the claimant goes to the expense of employing counsel to collect the balance due. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 458, 356 S.E.2d 75 (1987), aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1989).

Notice Prerequisite to Collection of Attorneys' Fees Under Subdivision (5). —

The case law is clear that a party seeking to collect attorneys' fees incurred in the enforcement of a note must notify in writing the opposing party of this intent. Thomas v. Miller, 105 N.C. App. 589, 414 S.E.2d 58, cert. denied, 331 N.C. 557, 417 S.E.2d 807 (1992).

Reasonableness as Key Factor. —

Where a lease agreement provided for the payment of "reasonable attorney's fees" should the landlord have needed to employ an attorney to collect rent or enforce its other rights and remedies under the lease, but did not refer to any specific percentage, subdivision (2) of this section predetermined that fifteen percent (15%) was a reasonable amount. RC Assocs. v. Regency Ventures, Inc., 111 N.C. App. 367, 432 S.E.2d 394 (1993).

Notice Held Sufficient. — Notice of intent to enforce attorneys' fees provision of note held sufficient. Federal Land Bank v. Lieben, 86 N.C. App. 342, 357 S.E.2d 700 (1987).

Language in a guaranty contract was sufficient to put a guarantor on notice that he would be liable for attorney's fees if he failed to make the guaranteed payment before the creditor found it necessary to employ an attorney to collect the debt. RC Assocs. v. Regency Ventures, Inc., 111 N.C. App. 367, 432 S.E.2d 394 (1993).

Where an agreement only mentioned reasonable attorneys' fees and did not specify an exact amount to be paid, this section governed, and the trial court properly allowed the plaintiff to recover reasonable fees amounting to 15% of the outstanding balance owed on defendants' account. W.S. Clark & Sons v. Ruiz, 87 N.C. App. 420, 360 S.E.2d 814 (1987).

Demand by Obligor for Arbitration. — The notice provisions of subdivision (5) of this section have no application in a situation where the obligor has refused to pay obligee's claim and demanded arbitration pursuant to the terms of the contract. Moreover, when obligee filed its response to obligor's demand for arbitration, and its own claim for the balance due on the contract, it clearly notified obligor that it was demanding attorneys' fees under the terms of the contract. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75 (1987), aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1989).

Evidence of Indebtedness Held Sufficient. — Credit application signed by partner was sufficient evidence of indebtedness under this section to obligate partnership to pay attorneys' fees. Hedgecock Bldrs. Supply Co. v. White, 92 N.C. App. 535, 375 S.E.2d 164 (1989).

No Award of Attorneys' Fees Where Plaintiff Failed to Notify. — Where provision in note provided for payment of note holder's costs and expenses in enforcing note if makers failed to pay as required, and these costs and expenses specifically included "reasonable" attorneys' fees, but there was no evidence that plaintiff notified defendants of its intention to collect attorneys' fees pursuant to this section, award of attorneys' fees was in error. Raleigh Fed. Sav. Bank v. Godwin, 99 N.C. App. 761, 394 S.E.2d 294 (1990).

There was sufficient evidence to support award of attorneys' fee of $24,308.00 where the award was supported by the affidavit of plaintiff's attorney, and billing statements showing the actual work performed and the attorneys' hourly rates, and the trial court made findings of fact as to the reasonable amount of time required for the services and the reasonableness of the hourly rates. Barker v. Agee, 93 N.C. App. 537, 378 S.E.2d 566 (1989), rev'd on other grounds, 326 N.C. 470, 389 S.E.2d 803 (1990).

Attorney's Fees Provision in Credit Agreement Held Enforceable. — Where, although no supporting affidavit was presented, there was a formal credit agreement which provided for reasonable attorney's fees for the collection of past due debts, and the trial court had before it the pleadings, depositions, and interrogatories, enabling it to make a determination as to the extent of work performed by counsel and the reasonableness of the fees assessed, the attorney's fees provision was legally enforceable. Institution Food House, Inc. v. Circus Hall of Cream, Inc., 107 N.C. App. 552, 421 S.E.2d 370 (1992).

Recovery of Percentage of Outstanding Balance. — Where contract provided that owner would pay reasonable attorneys' fees incurred by the contractor for the collection of any defaulted payment, under the provisions of this section, contractor could recover as attorneys' fees 15% of the "outstanding balance" due on the contract. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75 (1987).

Applied in Lawrence v. Wetherington, 108 N.C. App. 543, 423 S.E.2d 829 (1993).

Cited in Merritt v. Knox, 94 N.C. App. 340, 380 S.E.2d 160 (1989); Thorneburg Hosiery Co. v. G.L. Wilson Bldg. Co., 94 N.C. App. 769, 381 S.E.2d 718 (1989); First Am. Bank v. Carley Capital Group, 99 N.C. App. 667, 394 S.E.2d 237 (1990); West End III Ltd. Partners v. Lamb, 102 N.C. App. 458, 402 S.E.2d 472 (1991); Pinnacle Group, Inc. v. Shrader, 105 N.C. App. 168, 412 S.E.2d 117 (1992); Wachovia Bank v. Bob Dunn Jaguar, Inc., 117 N.C. App. 165, 450 S.E.2d 527 (1994).

§ 6-21.3. Remedies for returned check.

(a) Notwithstanding any criminal sanctions that may apply, a person, firm, or corporation who knowingly draws, makes, utters, or issues and delivers to another any check or draft drawn on any bank or depository that refuses to honor the same because the maker or drawer does not have sufficient funds on deposit in or credit with the bank or depository with which to pay the check or draft upon presentation, and who fails to pay the same amount, any service charges imposed on the payee by a bank or depository for processing the dishonored check, and any processing fees imposed by the payee pursuant to G.S. 25-3-512 in cash to the payee within 30 days following written demand therefor, shall be liable to the payee (i) for the amount owing on the check, the service charges, and processing fees and (ii) for additional damages of three times the amount owing on the check, not to exceed five hundred dollars ($500.00) or to be less than one hundred dollars ($100.00). If the amount claimed in the first demand letter is not paid, the claim for the amount of the check, the service charges and processing fees, and the treble damages provided for in this subsection may be made by a subsequent letter of demand prior to filing an action. In an action under this section the court or jury may, however, waive all or part of the additional damages upon a finding that the defendant's failure to satisfy the dishonored check or draft was due to economic hardship.

The initial written demand for the amount of the check, the service charges, and processing fees shall be mailed by certified mail to the defendant at the defendant's last known address and shall be in the form set out in subsection (a1) of this section. The subsequent demand letter demanding the amount of the check, the service charges, the processing fees, and treble damages shall be mailed by certified mail to the defendant at the defendant's last known address and shall be in the form set out in subsection (a2) of this section. If the payee chooses to send the demand letter set out in subsection (a2) of this section, then the payee may not file an action to collect the amount of the check, the service charges, the processing fees, or treble damages until 30 days following the written demand set out in subsection (a2) of this section.

(a1) The first notification letter shall be substantially in the following form:

This letter is written pursuant to G.S. 6-21.3 to inform you that on ______________________________, you made and delivered to the business listed above a check payable to this business containing your name and address in the sum of $__________, drawn upon ____________________ (bank or institution), account # __________. **[If the check was received in a face-to-face transaction insert this sentence:** This check contained a drivers license identification number from a card with your photograph and mailing address, which was used to identify you at the time the check was accepted.] **[If the check was delivered by mail insert this sentence:** We have compared your name, address, and signature on the check with the name, address, and signature on file in the account previously established by you or on your behalf, and the signature on the check appears to be genuine.] Also, we have received no information that this was a stolen check, if that is the circumstance.

The check has been dishonored by the bank for the following reasons:

____

As acceptor of the check, we give you notice to rectify any bank error or other error in connection with the transaction, and to pay the face value of the check, plus the fees as authorized under G.S. 25-3-512 and G.S. 6-21.3(a) as follows:

Face value of the check #	$ _______________
Processing fee authorized under G.S. 25-3-512	$ _______________
Bank service fees authorized under G.S. 6-21.3	$ _______________
Total amount due:	$ _______________

If the total amount due listed above is not paid within 30 days of the mailing of this letter, thereafter we may file a civil action to seek civil damages of three times the amount of the check (with a minimum damage of one hundred dollars ($100.00) and a maximum damage of five hundred dollars ($500.00)) for allegedly giving a worthless check in violation of law (G.S. 6-21.3), in addition to the amount of the check and the fees specified above.

Appropriate relief will then be sought before a court of proper jurisdiction for full payment of the check plus all costs, treble damages, and witness fees.

If you do not believe you are liable for these amounts, you will have a right to present your defense in court. To pay the check or obtain information, contact the undersigned at the above business location. Cash or a bank official check will be the only acceptable means of redeeming the dishonored check.

If you do not believe that you owe the amount claimed in this letter or if you believe you have received this letter in error, please notify the undersigned at the above business location as soon as possible.

(a2) If the total amount due in subsection (a1) has not been paid within 30 days after the mailing of the notification letter, a subsequent demand letter may be sent and shall be substantially in the following form:

On ____________________, we informed you that we received a check payable to this business containing your name and address in the sum of $ __________, drawn upon ____________________ (bank or institution), account # ______________________________. This check contained identification information which was used to identify you as the maker of the check. Also, we have received no information that this was a stolen check, if that is the circumstance.

The check has been dishonored by the bank for the following reasons:

____

We notified you that you were responsible for the face value of the check ($ __________) plus the fees authorized under G.S. 25-3-512 ($ __________) and G.S. 6-21.3(a) ($ __________) for a total amount due of $ ____________________. Thirty days have passed since the mailing of that notification letter, and you have not made payment to us for that total amount due.

Under G.S. 6-21.3, we claim you are now liable for the face value of the check, the fees, and treble damages. The damages we claim are three times the amount of the check or one hundred dollars ($100.00), whichever is greater, but cannot exceed five hundred dollars ($500.00). The total amount we claim now due is:

Face value of the check $ __________
Processing fee authorized
 under G.S. 25-3-512 $ __________
Bank service fees authorized
 under G.S. 6-21.3 $ __________
Three times the face value of the
 check, with a minimum of $100.00
 and a maximum of $500.00 $ __________
 Total amount due: $ __________

Payment of the total amount claimed above within 30 days of the mailing of this letter shall satisfy this civil remedy for the returned check.

If payment has not been received within this 30-day period, we will seek appropriate relief before a court of proper jurisdiction for full payment of the check plus all costs, treble damages, and witness fees.

If you do not believe you are liable for these amounts, you will have a right to present your defense in court. To pay the check or obtain information, contact the undersigned at the above business location. Cash or a bank official check will be the only acceptable means of redeeming the dishonored check.

If you do not believe that you owe the amount claimed in this letter or if you believe you have received this letter in error, please notify the undersigned at the above business location as soon as possible.

(b) In an action under subsection (a) of this section, the presiding judge or magistrate may award the prevailing party, as part of the court costs payable, a reasonable attorney's fee to the duly licensed attorney representing the prevailing party in such suit.

(c) It shall be an affirmative defense, in addition to other defenses, to an action under this section if it is found that: (i) full satisfaction of the amount of the check or draft was made prior to the commencement of the action, or (ii) that the bank or depository erred in dishonoring the check or draft, or (iii) that the acceptor of the check knew at the time of acceptance that there were insufficient funds on deposit in the bank or depository with which to cause the check to be honored.

(d) The remedy provided for herein shall apply only if the check was drawn, made, uttered or issued with knowledge there were insufficient funds in the account or that no credit existed with the bank or depository with which to pay the check or draft upon presentation. (1975, c. 129, s. 1; 1981, c. 781, s. 2; 1985, c. 643; 1993, c. 374, s. 1; 1995, c. 356, s. 1.)

Editor's Note. — Session Laws 1993, c. 374, s. 1, which amended subsection (a), was effective December 1, 1993, and applicable to checks written on or after that date.

Effect of Amendments. — The 1995 amendment, effective December 1, 1995, and applicable to checks delivered on or after that date, in subsection (a) added the second sentence in the first paragraph and rewrote the second paragraph; and added subsections (a1) and (a2).

§ 6-21.4. Allowance of counsel fees and costs in certain cases involving principals or teachers.

Legal Periodicals. —

For note, "A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

§ 6-21.5. Attorney's fees in nonjusticiable cases.

Legal Periodicals. — For note, "A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes," see 1989 Duke L.J. 438.

CASE NOTES

The purpose of this statute is not served by treating those who bring frivolous suits against indigent parties differently from those who bring frivolous suits against parties who can afford to retain their own counsel; therefore, the trial court's limitation of the attorneys' fee award to the court-appointed rate of $35.00 per hour was error. Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

Absence of Justiciable Issue. — To recover attorneys' fees under § 6-21.5, the party claiming attorney fees must be the "prevailing party," and there must be "a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

The mere filing of an affirmative defense without more is not sufficient to establish the absence of a justiciable issue, nor is the grant of a § 1A-1, Rule 12(b)(6) motion, nor the entry of summary judgment. These events may only be evidence of the absence of a justiciable issue. However, action by the losing party which perpetuated litigation in the face of events substantially establishing that the pleadings no longer presented a justiciable controversy may also serve as evidence for purposes of § 6-21.5. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

When defendant's answer raising the statute of limitations defense was filed and served, it should have become apparent to plaintiff that, barring circumstances permitting the statute of limitations to be tolled, the complaint no longer contained a justiciable issue. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Absence of Justiciable Controversy. — It is possible that a pleading which, when read alone set forth a justiciable controversy, may, when read with a responsive pleading, no longer present a justiciable controversy. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Section Not Limited to Initial Pleadings. — The legislative purpose of this section is to discourage frivolous legal action, and that purpose may not be circumvented by limiting the section's application to initial pleadings. Short v. Bryant, 97 N.C. App. 327, 388 S.E.2d 205 (1990).

Strict Construction of This Section. — Because statutes awarding an attorneys' fee to the prevailing party are in derogation of the common law, this section must be strictly construed. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Reasonable Attorneys' Fee. — Since this section authorizes the court to award "a reasonable attorney's fee," the trial court was not limited to the amount fixed by the district court in its payment of counsel appointed to indigent parties. Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

The only basis for the award of attorneys' fees under this section is the complete absence of a justiciable issue. Bryant v. Short, 84 N.C. App. 285, 352 S.E.2d 245, cert. denied, 319 N.C. 458, 356 S.E.2d 2 (1987), upholding order awarding attorneys' fees.

Before a court may tax attorneys' fees against a losing party under § 6-21.5 based upon the complete absence of a justiciable legal issue, the prevailing party must provide proof that the losing party should reasonably have been aware of the complaint's legal deficiencies. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

With regard to determining whether attorneys' fees may be awarded under this section, the first issue is whether the pleading, when read in conjunction with all the responsive pleadings, facially presents a justiciable issue of law. If not, the second issue is whether the losing party should reasonably have been aware that the pleading he filed contained no justiciable issue of law. dePasquale v. O'Rahilly, 102 N.C. App. 240, 401 S.E.2d 827 (1991).

Instead of acknowledging that the defendant's answer raised a virtually unassailable defense which foreclosed any reasonable expectation of an affirmative recovery by plaintiff, plaintiff forged on frivolously attempting to create a controversy. Under these facts the trial court could have found that such frivolous litigation constitutes a reckless waste of judicial resources as well as the time and money of the prevailing litigants. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

This section appears to be based on deterring frivolous and bad faith lawsuits by the use of attorneys' fees. Daniels v. Montgomery Mut. Ins. Co., 81 N.C. App. 600, 344 S.E.2d 847 (1986), rev'd in part, aff'd in part, 320 N.C. 669, 360 S.E.2d 772 (1987).

"Justiciable issues" are those which are real and present, as opposed to imagined or fanciful. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

"Complete absence of a justiciable issue" suggests that it must conclusively appear that such issues are absent, even giving the losing party's pleadings the indulgent treatment which they receive on motions for summary judgment or to dismiss. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Justiciable Issue Found. — Defendants were not entitled to attorney's fees because there was not a complete absence of a justiciable issue of either law or fact raised by plaintiffs' complaint even though the action was dismissed. Brittain v. Cinnoca, 111 N.C. App. 656, 433 S.E.2d 244 (1993), cert. denied, 339 N.C. 736, 454 S.E.2d 646 (1995).

Specific Findings Not Required Absent Justiciable Issue. — The sufficiency of a pleading is a question of law for the court, and the trial court need not make its findings more detailed if it states that the pleading raised no justiciable issue of law or fact. Bryant v. Short, 84 N.C. App. 285, 352 S.E.2d 245, cert. denied, 319 N.C. 458, 356 S.E.2d 2 (1987).

The granting of defendants' motion for summary judgment was not in itself a sufficient reason for the court's decision to award attorney's fees under this section; it could be evidence to support the court's decision to make such an award. Brooks v. Giesey, 334 N.C. 303, 432 S.E.2d 339 (1993).

Appeals. — Under a statute such as this section, which contains "prevailing party" requirement, the parties should not be required to litigate fees when the appeal could moot the issue. Furthermore, upon filing of a notice of appeal, a trial court in North Carolina is divested of jurisdiction with regard to all matters embraced within or affected by the judgment which is the subject of the appeal. Brooks v. Giesey, 106 N.C. App. 586, 418 S.E.2d 236 (1992), aff'd, 334 N.C. 303, 432 S.E.2d 339 (1993).

Award of attorneys' fees under this section held proper. Sprouse v.

North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986); Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

Trial court's findings of fact and conclusions of law, which established that from the initiation of this suit, there was never any factual or legal basis for finding defendants liable for any alleged injury suffered by plaintiffs from purchase of real property, were sufficient to uphold order awarding defendants costs (including reasonable attorney's fees) under this section. Brooks v. Giesey, 334 N.C. 303, 432 S.E.2d 339 (1993).

Court's order that defendant pay legal fees incurred by executor after defendant's default at judicial sale of estate's real and personal property held unauthorized. Parker v. Lippard, 87 N.C. App. 43, 359 S.E.2d 492, modified, 87 N.C. App. 487, 361 S.E.2d 395 (1987).

Fees Not Authorized Where Case Settled by Arbitration. — Where, although building owner filed complaint in civil court, case had already been submitted for arbitration and was settled by the award of the arbitrators, this section did not apply to authorize the trial court to award attorneys' fees incurred in the arbitration hearing; in order for the trial court to make such an award, the "civil action" or "special proceeding" providing the basis for the award must have been held before that tribunal or pursuant to its authority, and no order other than the order which placed the case in inactive status had been entered, nor had any action been taken in the superior court. Thorneburg Hosiery Co. v. G.L. Wilson Bldg. Co., 94 N.C. App. 769, 381 S.E.2d 718 (1989).

Collateral Issues. — Attorneys' fee requests under § 1A-1, Rule 11 and § 6-21.5 raise collateral issues which often require consideration by the trial court after the action has been terminated, and a voluntary dismissal under § 1A-1, Rule 41(a) does not deprive the trial court of jurisdiction to determine these collateral issues. To hold otherwise would allow a litigant or attorney to purge his violation of Rule 11 or § 6-211.5 merely by taking a dismissal, and thereby lose all incentive to stop, think and investigate more carefully before serving and filing papers. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Voluntary Dismissal. — Where the plaintiffs filed a voluntary dismissal with prejudice pursuant to § 1A-1, Rule 41(a)(1), the trial court was not deprived of jurisdiction to determine the appropriateness of attorneys' fees under § 1A-1, Rule 11 or § 6-21.5. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Applied in Harris v. Harris, 93 N.C. App. 67, 376 S.E.2d 502 (1989); Barnes v. Ford Motor Co., 95 N.C. App. 367, 382 S.E.2d 842 (1989); K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n, 96 N.C. App. 474, 386 S.E.2d 226 (1989).

Quoted in Tittle v. Case, 101 N.C. App. 346, 399 S.E.2d 373 (1991).

Cited in T'ai Co. v. Market Square Ltd. Partnership, 92 N.C. App. 234, 373 S.E.2d 885 (1988); Nichols v. Carolina Tel. & Tel. Co., 93 N.C. App. 503, 378 S.E.2d 230 (1989); Tay v. Flaherty, 100 N.C. App. 51, 394 S.E.2d 217 (1990); Smith v. McDonald, 767 F. Supp. 732 (M.D. N.C. 1991); Freese v. Smith, 110 N.C. App. 28, 428 S.E.2d 841 (1993).

§ 6-24. Suits by an indigent; payment of costs by an indigent.

A person who sues as an indigent is not required to advance the required court costs and no officer shall require any fee of the person. If a court enters a judgment in favor of a person suing as an indigent and does not require another party to the suit to pay the costs of the suit, the court may require the indigent person to pay any costs of the suit that were not required to be paid because the person was indigent. (1868-9, c. 96, s. 3; Code, s. 212; 1895, c. 149; Rev., s. 1265; C.S., s. 1247; 1993, c. 435, s. 5.)

Editor's Note. — Session Laws 1993, c. 435, s. 5, amended this section effective October 1, 1993, and applicable to all suits or appeals prosecuted on or after that date.

Chapter 7A.

Editor's Note. — The legislation and annotations affecting Chapter 7A have been included in a recently published replacement chapter.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1995

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1995 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY
Attorney General of North Carolina